Supreme Court, U.S.
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In The

Supreme Court Of The United States

October Term, 1997

SAL TINNERELLO & SONS, INC.,

Petitioner,

v.

TOWN OF STONINGTON; STONINGTON RESOURCE RECOVERY AUTHORITY; AND DONALD R. MARANELL, FIRST SELECTMAN,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

Counsel of Record:

ELIOT B. GERSTEN
GERSTEN & CLIFFORD
214 Main Street
Hartford, CT 06106
(860) 527-7044

STANLEY E. COX
Professor of Law
New England
School of Law
154 Stuart Street
Boston, MA 02116
(617) 422-7330

Counsel for Petitioner

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QUESTIONS PRESENTED

1) Did the appellate court erroneously rule that there is no likelihood of Commerce Clause violation when a local government legislates a garbage monopoly which forecloses all access for local generators and haulers to the interstate trash collection, processing and disposal markets?

2) Is there "market participant" or "public utility" exemption from dormant Commerce Clause scrutiny for trash collection, under which a local government can legislate a garbage monopoly which forecloses all access for local generators and haulers to the interstate trash collection, processing and disposal markets, and under which a local government can also direct garbage collected by the monopolist to a designated in-state facility?

3) Did the appellate court erroneously rule that there is no likelihood of commerce clause violation when a local government requires pick up of all trash by a government selected hauler, and then additionally restricts disposal of all such collected trash to a single in-state facility for primarily, if not exclusively, economic protectionist reasons?

4) Did the appellate court erroneously rule that there is no likelihood of Contract Clause violation when a local government makes illegal all existing and future contracts of a trash collector with commercial entities in the city, by legislating that only a competitor may collect trash in the city?

PARTIES

The caption to the case contains the name of all parties to the case. Sal Tinnerello & Sons, Inc. (PETITIONER) has no parent companies nor subsidiaries, but is a closely-held, family-owned corporation.

TABLE OF CONTENTS

Questions Presented for Review....i
Parties....ii
Table of Contents....iii
Table of Authorities....vi
Opinions Below....1
Jurisdiction....1
Legal Provisions Involved....1
Statement of the Case....2
Summary of Argument....5
Argument for Grant of Certiorari....7

I. This Court should grant certiorari because the Court below departed from this Court's controlling precedents....7

A. The Court below authorized a monopoly which this Court has held violates the dormant Commerce Clause....7

1. Legislating a trash monopoly constitutes per se diserimination against interstate commerce....7

2. The court below improperly failed to subject a government legislated trash monopoly to heightened scrutiny....11

B. The Court below improperly extended market participant exemption to government action that completely prohibits participation in the interstate market....11

1. Government is only a market participant when it puts its own funds at risk and intrudes narrowly into the market for which it claims participant status.....13

2. The court below declared local government to be a market participant when it handed over a trash monopoly to a favored hauler for the local government's economic benefit.....16

C. The court below improperly failed to apply heightened scrutiny to an ordinance which requires disposal as a designated in-state facility.....17

1. Limiting waste processing to a favorite local facility impermissibly discriminates against interstate commerce and cannot be justified by health and safety or economic necessity rationales.....17

2. The court below authorized flow control to an in-state facility for primarily economic reasons.....18

II. This Court should grant certiorari in this case to provide a uniform standard for monopoly and market participant situations.....19

A. The Second Circuit's approach is being applied without any appreciation for the factual distinctions, both in the Second Circuit and elsewhere.....19

B. The Third Circuit and the Eleventh Circuit do not follow the Second Circuit's position.....20

C. If there is a public utility exemption from Dormant Commerce Clause scrutiny, this Court should provide guidelines under which any such exemption should be granted.....22

III. This Court should grant certiorari because the decision of the court below authorizes wholesale abrogation of contract rights.....25

CONCLUSION.....29

Appendix
Opinion of the Second Circuit.....A-1
Memorandum Opinion of the trial court.....A-24
Contract.....A-37
Ordinance.....A-45

TABLE OF AUTHORITIES

Cases:

Allied Structural Steel Co. v. Spannaus,
438 U.S. 234 (1978).....26,27

Atlantic Coast Demolition & Recycling v. Board of Chosen Freeholders,
112 F.3d 652 (3rd Cir. 1997).....21

C&A Carbone, Inc. v. Clarkstown,
511 U.S. 383 (1994)
.....3,4,5,7,8,9,10,11,16,17,18,20,23,25,26,27

California Reduction Co. v. Sanitary Reduction Works,
199 U.S. 306 (1905).....23

Camps Newfound/Owatonna v. Town of Harrison,
520 U.S. 564 (1997).....16,23,28

Connecticut Carting Co. v. Town of East Lyme,
946 F.Supp. 152 (D.Conn.1995).....3,4

Dean Milk Co. v. Madison,
340 U.S. 349 (1951)..... 9,10

Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't. Of Natural Resources,
504 U.S. 353 (1992).....16,17

Gardner v. Michigan,
199 U.S. 325 (1905).....23

General Motors v. Tracy,
519 U.S. 278 (1997).....24

GSW, Inc. v. Long County,
999 F.2d 1508 (11th Cir. 1993).....22,23

Harvey & Harvey, Inc. v. County of Chester,
68 F.3d 788 (3rd Cir. 1995).....20,21

Home Bldg. & Loan Assn. v. Blaisdell,
290 U.S. 398 (1934).....26,27

Houlton Citizens' Coalition v. Town of Houlton,
982 F.Supp. 40 (D.Me.1997).....20

Hughes v. Alexandria Scrap Corp.,
426 U.S. 794 (1976).....15,16

New Energy Co. of Indiana v. Limbach,
486 U.S. 269 (1988).....16

Philadelphia v. New Jersey,
437 U.S. 617 (1978).....17,18

Reeves, Inc. v. Stake,
447 U.S. 429 (1980).....14, 15,16

South Carolina v. United States,
199 U.S. 437 (1905).....28

SSC Corp. v. Town of Smithtown,
66 F.3d 502(2nd. Cir. 1995).....12,19,20

United States Trust Co. of N.Y. v. New Jersey,
431 U.S. 1 (1977).....27

USA Recycling, Inc. v. Town of Babylon,
66 F.3d 1272 (2nd Cir. 1995).....19,20,23

Waste Management of Alameda County,
Inc. v. Biagini Waste Reduction Systems, Inc.,
74 Cal. Rptr. 2d 676 (Cal. App. 1998).....20

Waste Recycling, Inc. v. Southeast Alabama
Solid Waste Disposal Authority,
814 F. Supp. 1566 (M.D. Ala 1993)
affirmed without opinion,
29 F.3d 641 (11th Cir. 1994).....14,22

West Lynn Creamery, Inc. v. Healy,
512 U.S. 186 (1994).....13,14

White v. Massachusetts Council of Construction
Employers, Inc.,
460 U.S. 204 (1983).....15,16

Wickard v. Filburn,
317 U.S. 111 (1942).....28

Constitutional Provisions:

U.S. Const. Article I, Section 8
(Commerce Clause).....*passim*

U.S. Const. Article I, Section 10
(Contract Clause).....25-29

Statutes:

28 U.S.C. Section 1254(1).....1

42 U.S.C. Section 1983.....3

Town of Stonington Solid Waste
Ordinance.....*passim*

Miscellaneous:

Martin H. Redish & Shane V. Nugent,
The Dormant Commerce Clause and The Constitutional Balance of Federalism,
1987 Duke L.J. 569.....28

Sal Tinnerello & Sons, Inc. respectfully petitions for a writ of certiorari to review the decision of the Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Second Circuit is reported at 141 F. 3d 46 (2nd Cir. 1998) (Appendix A-1- A-23). The opinion of the trial court (Appendix A-24 - A-36) is unreported.

JURISDICTION

The Second Circuit entered its decision on April 3, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

LEGAL PROVISIONS INVOLVED

1) Article I, Section 8 of the United States Constitution provides: "The Congress shall have Power...To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes...."

2) Article I, Section 10 of the United States Constitution provides: "No state shall ...pass any ...Law impairing the Obligation of Contracts...."

3) Portions of a "Contract between Southeastern Connecticut Regional Resources Recovery Authority and Town of Stonington, a Municipality of the State of Connecticut" entered into on November 13, 1985 are set forth in the Appendix at pp A-37 - A-44

4) Portions of a "Town of Stonington Solid Waste Ordinance," adopted April 21, 1997 and effective May 12, 1997 are set forth in the Appendix at pp A-45 - A-46.

STATEMENT OF THE CASE

Sal Tinnerello & Sons, Inc. ("Tinnerello"), Plaintiff and Appellant below and Petitioner here, is a Connecticut waste collection and hauling business. *See* A-25 Until July 18, 1997, Tinnerello collected commercial waste within Defendant (Appellee below and Respondent here) Town of Stonington's (hereafter "Stonington" or "Town") boundaries, transporting to out-of-state disposal facilities when this was price effective. As of July, 1997 Tinnerello had approximately 70 commercial contracts in Stonington, Connecticut. These commercial waste contracts generated approximately $18,000 per month in revenue, plus Tinnerello had additional construction related "roll-off" waste business in Stonington. *See* A-32 - A-33 and n.7. Several of Tinnerello's commercial contracts extended beyond one year; many others had automatic renewal provisions. *See* A-32. In April 1997 Stonington passed an ordinance which prohibited anyone but the Town's chosen contract hauler from collecting or transporting any waste generated in the Town. *See* A-46.

Believing the ordinance to be, among other things, an unconstitutional infringement of Tinnerello's rights under the Commerce Clause and the Contract Clause of the United States Constitution, Tinnerello brought suit on June 20, 1997 in state court. Tinnerello claimed, among other things, violation of its constitutional rights under 42 U.S.C. § 1983 and sought preliminary and permanent injunctive relief and damages. The case was timely removed to the United States District Court of Connecticut on the basis of the federal questions. The trial court denied preliminary injunctive relief on July 18, 1997, and the Second Circuit affirmed on April 3, 1998, ruling that there was no likelihood of success on the merits for

either Tinnerello's Contract or Commerce Clause claims. *See* A-3, A-10 - A-11, A-22. Tinnerello seeks in this Court reversal of this determination that Tinnerello is unlikely to succeed on either its Commerce Clause or Contract Clause claims.

The ordinance which Tinnerello challenges came into existence as a response to this Court's ruling in *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383 (1994) and a subsequent case, *Connecticut Carting Co. v. Town of East Lyme*, 946 F. Supp. 152 (D. Conn. 1995). Prior to *Carbone*, in November 13, 1985, Stonington contracted with the Southeastern Connecticut Regional Resources Recovery Authority ("SCCRA"). The contract purports to obligate Stonington each year to "put" in excess of 10,000 tons of acceptable waste with a waste incineration facility in Preston, Connecticut, constructed by authority of SCCRA, or to "pay" the amount of tipping fees associated with that quantity of waste, whether or not the waste is delivered to the incinerator. *See* A-4, A-38 - A-44. This "put or pay" agreement was designed to generate a stream of predictable revenue to attract a private company to run the Preston incinerator and to pay for the bonds issued to finance incinerator construction. *See* A-3 - A-5, A-26 - A28.

Prior to *Carbone*, the Town and SCCRA assumed that the Town's "put or pay" obligation to SCCRA could be accomplished by legislating the "put" part of the commitment. The 10,000+ ton per year waste commitment had been calculated on estimates of how much acceptable waste is generated in the Town. *See* A-4, A-28. If the Town could direct all acceptable waste to the Preston facility, then the Town would incur no financial liability, the facility would be profitable, and the bonds would be retired. In fact, under the contract between the Town and SCCRA, the Town was obligated to institute such flow control. *See* A-28, A-37. When

Carbone, however, invalidated flow control, towns within the SCCRA compact began scrambling for financing alternatives. One of the first attempts at recycled flow control was by East Lyme, a fellow SCCRA member. When East Lyme's "weighing fee" on all in-town waste was ruled unconstitutional in *Connecticut Carting* in December, 1995, Stonington was faced with the probability that serious shortfalls to the Preston incinerator would occur if something else was not soon attempted. *See* A-6 - A-7, A-29.

By March, 1997, only eleven tons of commercial waste from Stonington arrived at the Preston incinerator. *See* A-30. Preston's tipping fee of $84.00 per ton was approximately 50% higher than spot market disposal prices of $57.50 per ton. *See* A-31; *cf.* A-5 - A-6. In anticipation of a continuing waste shortfall, and ensuing financial liability of as much as half a million dollars to the Town, *see* A-6 - A-7 and n.5, the Town considered its options. *See* A-29 - A-30. One option was to subsidize waste haulers to take to the Preston facility. This option was successfully implemented on an interim basis from April through June, 1997, resulting in sufficient commercial waste going to Preston for the Town thereby to meet its "put" obligations. *See* A-7, A-31. But the Town recommended against continuing this option for the long haul, in large part because it required raising taxes to generate the approximately $200,000 in annual funds needed for the subsidy. *See* A-7, A-30 - A-31. The Town's preferred option, which became embodied in the ordinance here at issue, was to legislate a purported "takeover" of the municipal trash collection market. *See* A-7.

Stonington's waste "solution" to its financial "crisis" prohibits anyone but a hauler or haulers with whom the town contracts to collect waste in the Town, with violations punishable at up to $5000 per

violation. *See* A-9. As a condition of entering into a contract with the Town for exclusive franchise over all or some of the town's commercial waste districts, the Town requires the selected hauler to deliver all acceptable commercial waste collected in the Town to the Preston facility. *Id.* The Town does not collect any waste itself or expend any funds in collection activities, but instead purports to make its franchise winner its agent for collection activities. *See id.* Believing that such a restriction on competition, with additional designation to the Preston facility is unconstitutional, Tinnerello did not bid for the monopoly franchise. *See id.* Tinnerello accordingly was prohibited, effective July 1, 1997 from operating in Stonington, and all its then existing contracts were made illegal.

SUMMARY OF ARGUMENT

An astonishing transformation and circumvention of this Court's Commerce Clause jurisprudence currently is taking place. Local governments, forbidden by this Court's holding in *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383 (1994), from directing trash to a single local facility, erroneously have reasoned that they can get around *Carbone* by *increasing* the burden on interstate commerce. They pass a law authorizing a local monopoly. They then order the winning local monopolist to take trash to the same local facility which previously was forbidden. Presto, change-o! What was formerly forbidden flow control is metamorphosed (according to the local government) into permissible market participation.

Such sweeping expansion of the market participation doctrine finds no support in this Court's precedents. This Court's precedents, however, are being ignored in favor of two Second Circuit decisions which first propagated this mutant form of market

participation logic in 1995. The Second Circuit has confirmed in the instant case that these precedents are to be read broadly, and several courts in other jurisdictions similarly broadly have read away this Court's restrictions. What has emerged is a two forked and fundamentally flawed rule, which the Second Circuit applied against Tinnerello below: 1)When a local government declares a need to eliminate competition, that declaration alone becomes a legitimate local purpose which outweighs facial discrimination against interstate commerce; 2) Once the local government thus eliminates all competition, it may do what it likes in regard to contracts, as a market participant.

These notions are so far removed from what this Court has authorized, that this misinterpretation of governing law alone justifies a grant of certiorari in this case. However, the decision below also conflicts with decisions from the Third and the Eleventh Circuits. There are currently at least three views competing in the courts below on what is the proper law to apply to local government claims of market participant status over trash collection services. Lower courts need this Court's guidance on what law should govern Commerce Clause challenges to trash monopoly legislation.

The logic of the decision below is in no way limited to the trash context, however. The Second Circuit's perversion of dormant Commerce Clause doctrine therefore has troubling implications for all situations where a local government might desire costlessly to decree the elimination of private competition and cut a deal for favored business entities. If there is to be a public utility exception to dormant commerce clause scrutiny, the exception necessarily must have some conditions additional to a local government saying that it wants a monopoly. This Court should define what

conditions must be met before a local government can shut off competition altogether in competitive interstate markets.

Finally, the Contract Clause imposes independent and alternative restrictions against government monopoly. Where government does not just regulate contracts, but instead abolishes all existing contracts and prohibits any future contracts except for those made by its preferred waste hauler, this constitutes an impairment of contract rights which Article I, Section 10 forbids.

ARGUMENT FOR GRANT OF CERTIORARI

I. This Court should grant certiorari because the Court below departed from this Court's controlling precedents

A. The Court below authorized a monopoly which this Court has held violates the dormant Commerce Clause.

1. Legislating a trash monopoly constitutes per se discrimination against interstate commerce.

In *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383 (1994) this Court held facially discriminatory and unconstitutional an ordinance which prevented locally generated waste from being disposed of in the interstate waste processing market. The decision provoked a sharp disagreeing concurrence from Justice O'Connor and an even sharper dissent from Justice Souter. Both Justices were troubled by the majority's finding that a local monopoly constitutes per se discrimination against interstate commerce. The

two Justices were not confused, however, about what *Carbone* meant. The heart of the *Carbone* decision is contained in the following excerpt:

> ....The flow control ordinance at issue here squelches competition in the waste-processing service altogether, leaving no room for investment from outside.
>
> Discrimination against interstate commerce in favor of local business or investment is per se invalid, save in a narrow class of cases in which the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest....

511 U.S. at 392. Under *Carbone*, any waste regulation which "squelches competition in the waste-processing service altogether" discriminates per se against interstate commerce and therefore is presumptively unconstitutional.

Justice O'Connor correctly described, although she disagreed with, this Court's *Carbone* decision. "In effect the town has given a waste processing monopoly to the transfer station. The majority concludes that this processing monopoly facially discriminates against interstate commerce." 511 U.S. at 402 (O'Connor, J., concurring on alternative grounds). In Justice O'Connor's view, the *Carbone* majority ignored important distinctions between town-decreed monopoly situations and previous favoring of local competition. *See id.* at 402-04.

> Unlike the regulations we have previously struck down, Local Law 9 does not give more favorable treatment to local interests as a group as compared to out-of-state or out-of-town economic interests. Rather, the garbage sorting monopoly is achieved at the expense of all competitors, be they local or nonlocal.

Id. at 404. She viewed such "even-handed

'discrimination'" potentially permissible under the Commerce Clause. *See id.* The *Carbone* majority rejected Justice O'Connor's arguments.

Similarly, Justice Souter, in dissent, tried to distinguish town authorized monopoly from impermissible economic protectionism, and thereby distinguished his position from this Court's. He faulted this Court for failing to give constitutional significance to the fact that "Clarkstown's ordinance favor[s] a single processor, not the class of all such businesses located in Clarkstown." *Id.* at 416 (Souter, J., dissenting). Justice Souter's argument was that there was no discrimination unless local processors were chosen solely because they were local. *See id.* at 416-18. Clarkstown's law was constitutional, in Justice Souter's view, because the "exclusion of outside capital is part of a broader exclusion of private capital, not a discrimination against out-of-state investors as such." *Id.* at 418. In Justice Souter's view, such exclusion might be anticompetitive, but it would not be economic protectionism. *See id.* The *Carbone* majority rejected Justice Souter's arguments.

This Court in *Carbone* looked at the same cases which the dissent and concurrence tried to distinguish, and saw those prior precedents as flatly and unambiguously prohibiting monopoly to a local processor. The constitutional harm was not primarily that the chosen processor was local, but rather that the monopoly itself necessarily foreclosed ability of outsiders (as well as insiders) to compete for business which should be interstate and competitive. To give larger portion of the majority opinion than earlier quoted:

> [T]he flow control ordinance discriminates, for it allows only the favored operator to process waste that is within the limits of the town. [citing *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951)]...

> In this light, the flow control ordinance is just one more instance of local processing requirements that we long have held invalid. [citations omitted]...
>
> The flow control ordinance... hoards solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility. The only conceivable distinction from the cases cited above is that the flow control ordinance favors a single local proprietor. But this difference just makes the protectionist effect of the ordinance more acute. In *Dean Milk*, the local processing requirement at least permitted pasteurizers within five miles of the city to compete. An out-of-state pasteurizer who wanted access to that market might have built a pasteurizing facility within the radius. The flow control ordinance at issue here squelches competition in the waste-processing service altogether, leaving no room for investment from outside.

511 U.S. at 391-92.

As this Court emphasized in *Carbone*, making processing services into a monopoly *accentuates* Commerce Clause discrimination. "[T]his difference just makes the protectionist effect of the ordinance more acute." *Id.* As Justice Souter also correctly noted, there was no indication in *Carbone* that the local processing facility was in fact a local citizen. *See* 511 U.S. at 418 n.7 ("The record does not indicate whether local or out-of-state investors own the private firm that built Clarkstown's transfer station for the municipality.") To the majority, the citizenship of the local processing monopolist was irrelevant. It did not matter who competed to become the waste processing monopolist or how fair was the competition. The monopoly itself constituted facial discrimination. In light of these *Carbone* messages, there is no room to

argue that the openness of a bidding process can protect a garbage collection monopoly from being held per se discriminatory.

2. *The court below improperly failed to subject a government legislated trash monopoly to heightened scrutiny.*

Nevertheless, the Second Circuit, in the decision below, argued that because the Town sought bids from both local firms and out of state competitors this meant no favoritism to in-state haulers. *See* A-22. These same arguments of "no greater burdens on nonlocal firms than... on local firms," *see id.*, had been raised by Justices O'Connor and Souter in *Carbone*, and rejected by the majority. The Second Circuit's reasoning is squarely at odds with this Court's rationale and holding in *Carbone*.

B. The Court below improperly extended market participant exemption to government action that completely prohibits participation in the interstate market.

The Second Circuit decision below is confusing and contradictory about what level of scrutiny should be applied to a government decree of a waste monopoly. On the one hand, the Second Circuit concedes that the legislative action of eliminating competition is market *regulation* and therefore is subject to Commerce Clause scrutiny. *See* A-20 - A-21 & n.10, A-21 - A-22. Nevertheless, when the Second Circuit scrutinizes this regulation, it allows itself to slip into justifying the regulation on grounds reserved only for market *participation*.

[H]aving concluded that the passage of the

> challenged ordinance constitutes market regulation, we must decide whether the ordinance discriminates against commerce. Tinnerello contends that the Town's ordinance is no different from the ordinance that we struck down in *SSC Corp.* [*v. Town of Smithtown*, 66 F.3d 502 (2nd Cir. 1995)]. Specifically, it argues that the Town's ordinance discriminates against interstate commerce because it was designed to benefit a single preferred facility. We disagree. First, Tinnerello overlooks the fact that the ordinance that we struck down in *SSC Corp.* was a flow control ordinance under which a municipality required local garbage haulers to buy processing or disposal services from a local facility. In the present case, the entities generating waste buy collection or disposal services solely from the Town. The Town then uses its discretion to dump the waste in what it deems to be an appropriate location....

A-21 - A22.

The Second Circuit logic is circular and constitutes bootstrapping. According to the Second Circuit, the reason that a "takeover" of the garbage market does not constitute impermissible regulation is because a takeover should be viewed as market participation rather than market regulation. Thus, the very reason that the government action constitutes regulation -- because no private actor would have power to decree the elimination of garbage hauling competition -- is what makes this regulation permissible regulation. This is Commerce Clause double talk. What the Second Circuit should be arguing is that there is a public utility exemption from dormant Commerce Clause scrutiny. Tinnerello will consider this argument in Section II.C infra. It is clear, however, that decreeing a garbage monopoly and then

directing monopolists to take their trash to a preferred facility is not market participation under this Court's precedents.

1. *Government is only a market participant when it puts its own funds at risk and intrudes narrowly into the market for which it claims participant status.*

As a preliminary matter, this Court has emphasized the impropriety of examining pieces of state action in isolation, when the state has but a single integrated plan. In *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994), this Court ruled unconstitutional a subsidy to Massachusetts dairy farmers that was financed by taxing sales of milk, two-thirds of which was produced out of state. Massachusetts argued that a state could place an even-handed assessment on milk sales to raise revenue, and the state could then distribute these funds as subsidies to its own citizens. *See id.* at 198-99. This Court rejected this attempt to de-link the subsidy from the source of the funds.

> Respondent's argument would require us to analyze separately two parts of an integrated regulation, but we cannot divorce the premium payments from the use to which the payments are put. It is the entire program ... that simultaneously burdens interstate commerce and discriminates in favor of local producers.

512 U.S. at 201. So, too, in this case the Second Circuit has attempted to de-link its exclusive franchise contracts from the regulation which produces the ability to make such exclusive contracts.

The Town's ability to enter into contracts, as market participant, does not protect the Town's unified waste *regulation* scheme from heightened dormant

Commerce Clause scrutiny. *See, e.g., Waste Recycling, Inc. v. Southeast Alabama Solid Waste Disposal Authority*, 814 F. Supp.. 1566, 1572-76 (M.D. Ala 1993) *affirmed without opinion*, 29 F.3d 641 (11th Cir. 1994) (waste regulation cannot be costlessly transformed into market participation). Tinnerello does not object to Stonington telling whoever collects waste from the Town jail or the Town schools that such waste must be taken to Preston. The Town may negotiate whatever rates and attach whatever conditions it wishes to contracts regarding waste that the Town produces as a result of conducting its governmental operations. Tinnerello *does* object, however, to the Town prohibiting others who generate their own waste from contracting with Tinnerello for disposal of that waste. Such restrictions are not actions of a market participant.

For example, in *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980), this Court permitted South Dakota, as a market participant, to limit sales from a state-owned cement facility to South Dakota companies. Applying the Second Circuit's approach to *Reeves* would require that there be a viable competitive private cement market in place in South Dakota, but that South Dakota wished to abolish that market. "Here's the deal," South Dakota would say to all cement companies otherwise willing to sell competitively. "One or at most three of you will be awarded exclusive franchise(s) to become monopoly seller(s) of cement for construction projects in all or part of South Dakota. We will decide which bid(s) is (are) best, based not just on price, but also on your willingness to do what we like in regard to all private cement projects in the state." If this Court would have approved such arrangement in *Reeves*, then the Second Circuit properly may claim that case for the market participant exemption approved below.

In *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204 (1983), Boston was permitted, as market participant, to require that contractors hire 50% Bostonians to work on municipal construction projects. The city paid for the projects with a combination of federal and city funds. Applying the Second Circuit's approach to *White* would require that Boston have decreed: "Henceforth no work will be done in this city on any construction anywhere in the city unless by a single contractor or contractors whom we will appoint. We will require as one of the conditions on contract(s) that the contractor(s) hire 50% Boston workers. We will set the rates we allow the contractor(s) to charge. We will designate from whom the contractor(s) may buy construction materials. And as to any objections the federal government or private 'clients' might have about 'their' money being directed in ways they did not approve, we don't care what they think. The contracts we allow them to enter into are not theirs. When the work takes place in the city of Boston, all the contracts for that work are *our* contracts which we have a right to negotiate as a market participant." If the Supreme Court would have approved such arrangement in *White*, then the Second Circuit properly may claim that case for the market participant exemption approved below.

The crucial thing missing from the Second Circuit's market participant reasoning is *participation* by the local government in the enterprises for which it claims market participant status. In the case below no Town capital or property was put at risk for collecting and disposing of commercial waste. In every case where this Court has allowed market participant exemption, by contrast, the government put up funds out of its own coffers. *See Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976) (bounty paid for hulk autos); *Reeves, supra* (cement plant built, owned and

operated by state); *White*, *supra* (city funds in construction contracts).

This Court has rejected claims that state actions which do not fall squarely within the factual requirements of *Hughes*, *Reeves*, and *White* can be considered market participation. *See, e.g.*, *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 277-78 (1988); *cf. Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't. of Natural Resources*, 504 U.S. 353, 363-66 (1992). In *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 117 S.Ct. 1590, 1606-07 (1997), this Court recently emphasized that only truly proprietary activity can be protected, and that there must be narrow and direct state involvement in the market. This Court expressed fear that "[t]he Town's version of the 'market participant' exception would swallow the rule against discriminatory tax schemes." *Id.* at 1607. So, too, the Second Circuit's version of market participation would swallow the rule against discriminatory regulatory enactments.

2. *The court below declared local government to be a market participant when it handed over a trash monopoly to a favored hauler for the local government's economic benefit.*

The fallacy of the Second Circuit's position is demonstrated by the ease with which a government could, under the Second Circuit's rationale, transform an admittedly *un*constitutional regulatory arrangement into purportedly constitutional market participation. If the Second Circuit were correct, all that the Town of Clarkstown would have to do to avoid this Court's ruling in *Carbone* would be to pass an ordinance decreeing that henceforth Clarkstown will be the sole provider of trash collection services to Clarkstown residents. Having by legislative decree thus

"eliminated" the private market for waste services, Clarkstown could then award the right to a select group of private companies to collect waste on the Town's behalf. As former haulers signed up to be on the Town's approved list, they would be required to sign a contract incorporating restrictions identical to what *Carbone* declared unconstitutional. Any hauler unwilling to sign would simply thereby lose the ability to be part of the Town's "market participant" collection activities. The Town would spend nothing (except the time required to draft and pass this new legislation) in order thus to become a purported monopoly market participant. Because the Second Circuit's approach to market participation is contrary to this Court's precedents, certiorari should be granted in this case.

C. The Court below improperly failed to apply heightened scrutiny to an ordinance which requires disposal at a designated in-state facility.

1. Limiting waste processing to a favored local facility impermissibly discriminates against interstate commerce and cannot be justified by health and safety or economic necessity rationales.

This Court has emphasized, since at least *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978) that Commerce Clause scrutiny is at its highest when a state regulation "overtly blocks the flow of interstate commerce at a State's borders." *See also Fort Gratiot*, 504 U.S. at 361-63 (requiring heightened scrutiny also to laws which limit movement to or within smaller state subdivisions). Such facial discrimination can be justified only upon the most compelling proof that

access to other states' commercial markets must be foreclosed.

When Clarkstown argued in *Carbone* that restriction to in-area facilities was necessary to ensure safe trash processing, this Court viewed such action as unconstitutional extra-territorial regulation. *See* 511 U.S. at 393 ("would extend the town's police power beyond its jurisdictional bounds"). When Clarkstown argued that in-area disposal was necessary to protect the public purse, this Court countered that economic necessity cannot justify discrimination against interstate commerce. *See id.* at 593-94.

2. *The Court below authorized flow control to an in-state facility for primarily economic reasons.*

The Second Circuit held that Stonington did not violate the dormant Commerce Clause by directing all trash to an in-state facility. The court gave police power arguments credence and also seemed to view the Town's financial "crunch," created by the constitutional compulsions of *Carbone*, as a good reason to ease Commerce Clause restrictions. But when a town claims police power as its justification for discrimination against interstate commerce,

> The teaching of our cases is that these arguments must be rejected absent the clearest showing that the unobstructed flow of interstate commerce itself is unable to solve the local problem. The Commerce Clause presumes a national market free from local legislation that discriminates in favor of local interests.

511 U.S. at 393. And "revenue generation is not a local interest that can justify discrimination against interstate commerce." *Id.* Because the Second Circuit's approach is squarely at odds with this Court's

precedents, certiorari should be granted in this case.

II. This Court should grant certiorari in this case to provide a uniform standard for monopoly and market participant situations.

A. The Second Circuit's approach is being applied without any appreciation for factual distinctions, both in the Second Circuit and elsewhere.

Until the decision below, there was still room to hope that the Second Circuit's decisions in *SSC Corp. v. Town of Smithtown*, 66 F.3d 502 (2nd Cir. 1995) and *USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272 (2nd Cir. 1995) might be limited to their facts. In *USA Recycling*, the town had determined that monopoly would effect a cost savings. *See* 66 F. 3d at 1278-79. The town also gave free access at the preferred facility for most trash coming there. *Id.* at 1279. In *SSC Corp.* it was *the bid winner* who claimed it did not have to abide by the contract it had just won. *SSC Corp.* therefore might properly have been limited to a "you've made your bed so now lie in it" holding. *Cf.* 66 F. 3d at 508 (indicating plaintiff hauler possibly pocketing savings by not performing contract it had won). These important factual aspects of both cases might have limited their applicability and tempered their broader language.

The Second Circuit's analysis below, however, is as broad as any local government might desire. Under the approach adopted below in the Second Circuit, if a local government merely legislates a takeover of the trash market, it may attach whatever conditions it desires to exclusive contracts it makes with bid winners. *See* A-19 - A-22.

Unfortunately, other courts are starting to apply

USA Recycling and *SSC Corp.* in similarly sweeping fashion. *See Waste Management of Alameda County, Inc. v. Biagini Waste Reduction Systems, Inc.*, 74 Cal. Rptr. 2d 676 (Cal. App. 1998); *Houlton Citizens' Coalition v. Town of Houlton*, 982 F. Supp.. 40 (D. Me. 1997).[1] Absent a ruling from this Court, an increasing number of jurisdictions may adopt the Second Circuit's fundamentally flawed approach. As the next section demonstrates, however, not all jurisdictions have adopted the Second Circuit's rule.

B. The Third Circuit and the Eleventh Circuit do not follow the Second Circuit's position.

The Third Circuit reads *Carbone* as neither absolutely prohibiting waste monopolies, nor entirely removing those monopolies from meaningful Commerce Clause scrutiny. *See Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788 (3rd Cir. 1995). Although Tinnerello believes that Judge Nygaard's *Harvey & Harvey* dissent more correctly reads this Court's controlling precedent, *see* 68 F.3d at 809-11 (Nygaard, dissenting; reading *Carbone* to prohibit monopoly designation), the Third Circuit's approach is nevertheless clearly at odds with the Second Circuit's rule.

1/ In a case on appeal in the Sixth Circuit, a trial judge, citing the Second Circuit's precedents, ruled that Commerce Clause claims against a legislated waste monopoly that directed waste to in state facilities must be dismissed under Fed. R. Civ. P. 12(b)(6) *for failure to state a claim.* The trial court opinion is unreported. If this Court should wish more information concerning the case, including a copy of the trial court opinion, Tinnerello would of course be happy to provide whatever might assist this Court in ruling on Tinnerello's Petition.

In the Third Circuit, multiple factors are balanced to determine whether a waste franchising monopoly constitutes discrimination against interstate commerce. *See* 68 F.3d at 801-03.[2] Had the Third Circuit's test been applied in the case below, the trial and appellate courts would have been compelled to find that Tinnerello's Commerce Clause claims were likely to succeed on the merits. This is so because under *Harvey & Harvey*, if a government-decreed monopoly results in a local processor (like Preston) receiving all the Town's waste, and/or if the monopoly seems motivated in large part by economic protectionist concerns (such as keeping the Town from incurring financial liability), then the government can only rebut this putative showing of discrimination by substantial evidence. *See id.* at 803.

Additionally, the Third Circuit would declare facially unconstitutional any waste designation scheme (like Stonington's) which prohibits transportation to out of state facilities. *See* 68 F.3d at 802, 804-05; *see also Atlantic Coast Demolition & Recycling v. Board of Chosen Freeholders*, 112 F.3d 652, 663 (3rd Cir. 1997). When a waste hauler gets dramatically different result based solely on its suit arising in New Jersey rather than in New York, this is strong reason for this Court to grant certiorari to

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2/ Tinnerello believes the *Harvey & Harvey* all factors test is improper, both because it finds no support in this Court's precedents and also because it is essentially ad hoc. *See id.* at 802 ("Admittedly, we cannot cite any authority for the sort of inquiry we will describe, but this area of law is nascent, and we are constrained to draw upon notions of reasonableness to effectuate the relevant policies."). Nevertheless, the Third Circuit's approach is quite different from the Second Circuit's blanket approval for whatever a local government might wish to do.

resolve this conflict.

The Eleventh Circuit analyzes these problems differently from either the Second or Third Circuit. In affirming the decision in *Waste Recycling, Inc. v. Southeast Alabama Solid Waste Disposal Authority*, 814 F. Supp.. 1566, 1572-76 (M.D. Ala 1993) *affirmed without opinion*, 29 F.3d 641 (11th Cir. 1994), the Eleventh Circuit limited market participation to situations where the local government owns the waste involved and does not try to regulate beyond these actual ownership interests. The Second Circuit specifically rejected this Eleventh Circuit decision. *See* 66 F. 3d at 515-16. The Eleventh Circuit emphasized in another waste and dormant Commerce Clause case that market participant status can not be claimed without investment by the government in the project. *See GSW, Inc. v. Long County*, 999 F.2d 1508, 1513 (11th Cir. 1993). *See also id.* at 1513-16 (explaining why expenditure of public funds protects against regulatory abuse and limits market participation to only proprietary actions). When waste administrators in Alabama and Georgia must operate under different Commerce Clause rules than do their counterparts in New York and Connecticut, this Court should grant certiorari to resolve the conflict.

C. If there is a public utility exemption from dormant Commerce Clause scrutiny, this Court should provide guidelines under which any such exemption would be granted.

The Town below, and the Second Circuit in one of its previous precedents, explicitly relied upon two 1905 decisions of this Court for the proposition that this Court has endorsed the kind of garbage monopoly against which Tinnerello raises constitutional objection. *See USA Recycling*, 66 F.2d at 1276 (relying

on *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905) and *Gardner v. Michigan*, 199 U.S. 325 (1905)). Such reliance is misplaced. Neither of these turn-of-the-century cases was brought under the Commerce Clause nor under the Contracts Clause, but rather under the Takings and Due Process Clauses. More importantly, both *California Reduction* and *Gardner* were specifically argued to this Court in *Carbone*.[3] This Court rejected the Second Circuit's implications regarding these cases in *Carbone*. It was only Justice Souter, *in dissent*, who relied upon *California Reduction* and *Gardner* for the proposition that the Constitution does not require unimpeded access to interstate markets to solve waste problems. *See* 511 U.S. at 419 n.10.

Nevertheless, to the extent courts below pretend that *California Reduction* and *Gardner* settled waste monopoly issues, this indicates confusion below about exactly what this Court's position is on challenges to government monopolies under the dormant Commerce Clause. One member of this Court recently suggested that this Court has carved out a "public utility" exception from dormant Commerce Clause scrutiny. *See Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 117 S.Ct. 1590, 1613-14 (1997) (Scalia, J., dissenting and discussing *General Motors v. Tracy*, 519 U.S. 278, 117 S.Ct. 811 (1997)). Tinnerello submits that any exemption from dormant Commerce

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3/ The cases were so frequently cited by Respondent Town of Clarkstown in its Brief to this Court that Clarkstown used the entry "passim" in its Table of Authorities for indication of use of the cases in its Brief. Examples of specific reliance on the cases can be found at pages 13, 22, 28, 41, 42, and 42-45 of the Brief of Respondent Town of Clarkstown in the *Carbone* case.

Clause scrutiny approved in *Tracy* is narrowly limited to the facts of that case. Where Congress nearly explicitly has approved state monopoly, and such monopoly is the only way to protect shivering householders, it is perhaps wise not to declare a Commerce Clause violation. But there is in reality no different test for monopoly utilities than for other dormant Commerce Clause situations. Government legislated monopoly, as *Carbone* emphasizes, discriminates facially against interstate commerce. Courts must therefore subject such monopoly to the heightened scrutiny of the per se test. However, if establishing the monopoly is the *only* way that the government can accomplish a legitimate regulatory goal, as may be true for some but certainly not all utility situations, then the monopoly would be allowed to stand.

The Second Circuit's contrary rule conflates legitimate ability to regulate with purported power to take over private markets. It therefore has no limiting principle. Under the Second Circuit's approach, merely mouthing a legitimate police power purpose justifies government-decreed monopoly of any and all interstate markets. Thus, concern about health care would justify requiring all residents to receive treatment only from a single HMO provider with whom the government might "contract." Concern for the health and safety of foodstuffs would justify government takeover of local grocers, with the result that only Stop and Shop might be permitted to sell meat and melons in Stonington. Since the list of areas in which local government might properly even-handedly regulate is nearly endless, so too would be the areas in which government could decree a monopoly exempt from meaningful dormant Commerce Clause scrutiny. This Court should grant certiorari in this case to confirm that there is no such sweeping public utility exemption

from dormant Commerce Clause scrutiny.

III. This Court should grant certiorari because the decision of the Court below authorizes wholesale abrogation of contract rights.

Finally, this Court should confirm through this case that the Contract Clause remains a meaningful part of our Constitution. Tinnerello's existing contracts were not regulated, they were abolished, and then replaced via private monopoly. The government did not institute a different method of trash collection. The Town simply took away all Tinnerello's business and gave it to a competitor. While Tinnerello might not have legitimate expectation that its *methods* of trash collection would always be subject to the same conditions as at the time it entered into contracts with its customers, the Contract Clause surely prevents a town from voiding contracts and taking away a business's ability to enter into contracts, when the sole justification is that the town wants thereby to avoid liability to another party with whom the town formerly contracted.

A government action clearly *il*legitimate under the Commerce Clause cannot legitimate action under the Contract Clause. Accordingly, the Town should not successfully have been able to argue that monopoly is necessary to achieve the same flow control which had just been declared illegal under the Commerce Clause. Nevertheless, the lower court endorsed such reasoning.

Stonington had no interest in voiding Tinnerello's contracts until it became illegal to flow control waste to Preston. Under the Contract Clause, the Town might have argued, at least pre-*Carbone*, that an ordinance requiring delivery to the Preston facility was merely an additional condition imposed onto *all* hauler's

contracts, including Tinnerello's, as a form of even-handed regulation. The court below appropriately might have included factors of substantiality of impairment, reasonableness, foreseeability, and legitimate public purpose in the balancing it used to evaluate such designation conditions the Town added to all haulers' existing contracts.

That case, however, does not match the facts below. Since requiring all haulers to take to the Preston facility would clearly violate *Carbone*, the Town cannot legislate such conditions into contracts. But the Town also cannot argue that it therefore now must be allowed to abolish all contracts in order to achieve this *same* purpose. To the extent the Town, for health and safety reasons, needed to designate all waste to the Preston facility, such arguments are foreclosed by *Carbone*. What the Town is left with is solely an economic argument. The Town entered into a contract with SCCRA which the Town assumes[4] is still enforceable against the Town, despite *Carbone*. Does this financial liability justify the Town abolishing all private waste contracts and all right to enter into such contracts?

Although economic interests sometimes justify modification, perhaps even abolition, of contract rights, the Town's "bad deal" with SCCRA does not fit with the controlling case law. No severe economic dislocation in larger society requires reordering extant waste contract rights. *Cf. Home Bldg. & Loan Assn. v. Blaisdell*, 290 U.S. 398 (1934) (approving mortgage moratorium legislation during the depression); *see generally Allied Structural Steel Co. v. Spannaus*, 438

4/ Tinnerello pointed out below that it is not certain the Town could not modify its contract with SCCRA, given the changed legal landscape, post-*Carbone*. *See* A-19.

U.S. 234, 241-45 (1978) (discussing criteria to be applied when state substantially impairs contract rights). Additionally and significantly, the government here directly financially benefits when it obliterates Tinnerello's contract rights. *Cf. United States Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 26 (1977) (higher scrutiny required when government is the contracting party). To the extent the Second Circuit below was claiming that a rule of mere rational relationship can justify complete contract abrogation to the government's benefit, its rationale conflicts with this Court's precedents, *see, e.g., Spannaus*, 438 U.S. 234, and distorts out of context this Court's opinion that a government's interest in the economic welfare *of its citizens* justifies modification of contract rights. *See* A-17 (misr[illegible]ng *Blaisdell*, *see* 290 U.S. at 437, as justifying the state protecting *its own* economic interests).

If the lower court interpretation of what is proper under the Contract Clause is allowed to stand, any time a government wants to abolish private competition with itself, because it finds the competition uncomfortable, this becomes sufficient justification for takeover of the market and voiding all existing contracts. If a local public school district enters into long-term contracts with teachers, but finds enrollment shrinking due to competition from private schools, this financial "crisis" would justify outlawing private schools and voiding *their* contracts with *their* teachers. A town which floats bonds to build and staff an HMO center, but then finds not enough patients coming to the facility to cover these fixed costs, could use this fiscal "crisis" to prohibit private practitioners from treating Town citizens and void *the private doctors'* contracts. This Court's case law does not support such wholesale abrogation of contract rights.

It is true that Tinnerello has reduced need to make Contract Clause arguments if the Second Circuit properly had held that Stonington's legislative acts violate the dormant Commerce Clause. This does not, however, make the Contract Clause claims any less an independent basis for proper grant of certiorari in this case. Additionally, at least two members of this Court seem currently dissatisfied with this Court's dormant Commerce Clause case law, and may apply alternative clauses to situations the majority evaluates under the dormant Commerce Clause. *See Camps Newfound/ Owatonna*, 520 U.S. at ___, 117 S.Ct. at 1620-30 (1997) (Thomas, J, dissenting, joined by Scalia, J.)

As Justice Thomas's *Camps Newfound/ Owatonna* opinion indicates, the Imports and Exports Clause could be read to protect against discriminatory tariffs and taxes. Similarly, one law professor has suggested that much of this Court's regulatory dormant Commerce Clause case law could be adjudicated under the Privileges and Immunities Clause. *See* Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 Duke L.J. 569. From the perspective of the Framers, however, there might still be one major category of commercial relations which would require protection under a separate provision. For contracts entered into wholly in state between in-state actors, there might be a need to ensure that the government could not unjustifiably take away the freedom to contract. A century and a half before *Wickard v. Filburn*, 317 U.S. 111 (1942), it might have been reasonable to the Framers to suppose that the Contract Clause would protect against infringement of contract rights such as has occurred in this case. *Cf., e.g., South Carolina v. United States*, 199 U.S. 437, 457-58 (1905) (discussing need to view Constitution through Framers' eyes and discussing probability that

Framers would not have been expecting states to institute monopolies).

CONCLUSION

For all the foregoing reasons, this Court should grant the Petition for a writ of certiorari.

Respectfully submitted,

PETITIONER, SAL TINNERELLO & SONS, INC.

Eliot B. Gersten
Counsel of Record
Gersten & Clifford
214 Main Street
Hartford, CT 06106
(860) 527-7044

Stanley E. Cox
Professor of Law
New England School of Law
154 Stuart Street
Boston, MA 02116
(617) 422-7330
Counsel for Petitioner

No. _____

In The
Supreme Court Of The United States
October Term, 1997

SAL TINNERELLO & SONS, INC.,
Petitioner,

v.

TOWN OF STONINGTON; STONINGTON RESOURCE RECOVERY AUTHORITY; AND DONALD R. MARANELL, FIRST SELECTMAN,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 1997

(Argued: November 5, 1997 Decided: April 3, 1998)
Docket No. 97-7919

SAL TINNERELLO & SONS, INC.,
Plaintiff-Appellant,

- v. -

TOWN OF STONINGTON; STONINGTON RESOURCE RECOVERY AUTHORITY; and DONALD R. MARANELL, First Selectman,
Defendants-Appellees.

Before:
MINER and PARKER, Circuit Judges,
and DEARIE, District Judge.*

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* The Honorable Raymond J. Dearie, of the United States District Court for the Eastern District of New York, sitting by designation.

Appeal from an order of the United States District Court for the District of Connecticut (Chatigny, J.) denying plaintiff's motion for a preliminary injunction to prevent enforcement by defendants of a local ordinance providing for a municipal takeover of solid waste collection, the court having found that plaintiff had established neither irreparable harm nor a likelihood of success on the merits with respect to either its Contract Clause or Commerce Clause claim.
Affirmed.

ELIOT B. GERSTEN, Gersten & Clifford, Hartford, CT (John P. Clifford, Jr., Gersten & Clifford, Hartford, CT; Aviva Cuyler, Petaluma, CA, on the brief), for Plaintiff-Appellant.

ROBERT D. TOBIN, Tobin, Carberry, O'Malley, Riley & Selinger, P.C., New London, CT (Thomas J. Riley, Susan L. DiMaggio, Tobin, Carberry, O'Malley, Riley & Selinger, P.C., New London, CT, on the brief), for Defendants-Appellees.

MINER, Circuit Judge:

Plaintiff-appellant Sal Tinnerello & Sons, Inc. ("Tinnerello") appeals from an order of the United States District Court for the District of Connecticut (Chatigny, J.) denying its motion for a preliminary injunction to prevent the defendants, Town of Stonington ("Stonington" or the "Town"), Stonington Resource Recovery Authority (the "Authority") and Donald R. Maranell, First Selectman of Stonington's Board of Selectmen, from enforcing an ordinance creating the Authority and providing that (1) the Authority or solid waste collectors with whom the Authority has contracted will remove, transport and

dispose of all commercial solid waste generated in Stonington and (2) all others are prohibited from removing, transporting or disposing of such waste. The order was grounded on the district court's view that Tinnerello had failed to make a sufficient showing of irreparable harm or likelihood of success on the merits of its claims brought under the Contract and Commerce Clauses of the United States Constitution.

For the reasons that follow, we affirm the order of the district court which is the subject of this appeal.

BACKGROUND

In 1973, the Connecticut General Assembly created the Connecticut Resources Recovery Authority (the "CRRA"), a public instrumentality and political subdivision of the State of Connecticut. The CRRA was charged with the task of replacing Connecticut's landfills with incinerator or "waste-to-energy" facilities.[1] Pursuant to the State Solid Waste Management Plan (the "State Plan"), six incinerators have been built at various locations throughout the State of Connecticut. Stonington, a town in southeastern Connecticut, together with approximately thirteen other towns in the region, is a member of the Southeastern Connecticut Regional Resource Recovery Authority (the "SCRRRA"). The SCRRRA is a public instrumentality and political subdivision of the State of Connecticut operating at the local level. In 1992, the SCRRRA constructed an incinerator in Preston, Connecticut ("Preston") to serve the disposal needs of SCRRRA member towns. Construction of the Preston facility was financed

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1/ "Waste-to-energy" facilities burn solid waste, generating energy that is sold to utility companies.

through the sale of bonds issued by the CRRA. Stonington, consistent with the State Plan, undertook to participate in the construction of the Preston incinerator in order to provide a safe and efficient means of disposing of its solid waste. Stonington and the other member towns each entered into a written contract with the SCRRRA, the terms of which are substantially the same. Under the terms of its contract dated November 13, 1985, Stonington guaranteed delivery of an annual minimum amount of solid waste to the Preston incinerator. The purpose of the minimum commitment is to ensure a flow of funds to the SCRRRA sufficient for proper operation of the facility and payment of the bond commitments. Stonington's minimum commitment to the Preston facility is 10,149 tons of residential and commercial solid waste per year. Residential collections in Stonington, on average, yield 3,000 to 4,000 tons. Stonington depends on collections from commercial accounts to provide the rest of the required solid waste, approximately 6,000 tons per year. If such an amount is not delivered, the Town must pay the equivalent of the cost of disposing of that portion of the minimum commitment which was not delivered. Stonington's full faith and credit backs the commitment.

The contract between Stonington and the SCRRRA also provided that the former would enact a flow control ordinance requiring all waste haulers collecting within Stonington's borders to utilize the Preston facility. At the Preston facility, the haulers would have to pay a "tipping fee"[2] for each ton of

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2/ "Sometimes referred to as a gate fee or disposal charge, the term 'tipping fee' is derived from the fact that trucks delivering waste must 'tip' the back-end of

solid waste dumped. The waste delivered by these private haulers would be credited towards satisfaction of the Town's minimum commitment. Stonington adopted a flow control ordinance, as was contractually required. In May of 1994, however, the Supreme Court held that flow control ordinances were violative of the Commerce Clause of the United States Constitution. See C&A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994). Moreover, in December of 1995, a district court in this Circuit enjoined enforcement of the flow control ordinance adopted by the Town of East Lyme, Connecticut, another member of the SCRRRA, on the ground that the ordinance violated the Commerce Clause. See Connecticut Carting Co. v. Town of East Lyme, 946 F. Supp. 152 (D. Conn. 1995). Tinnerello, a closely-held company that conducts waste-hauling operations throughout southeastern Connecticut, was a party to that case as well. See id. Subsequent to the ruling in Connecticut Carting, the volume of solid waste delivered to the Preston facility dropped substantially.[3] No longer legally compelled to bring waste to Preston, private haulers avoided the facility and disposed of their waste at other places, including transfer stations in the State of Rhode Island, where rates were lower than those

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the truck to drop off the waste." Eric S. Petersen & David N. Abramowitz, Municipal Solid Waste Flow Control in the Post-Carbone World, 22 Fordham Urb. L.J. 361, 369 n.46 (1995).

3/ Presumably Stonington's flow control ordinance was repealed subsequent to the Connecticut Carting ruling.

charged by Preston.[4] For example, the tipping fee charged by Preston was approximately $79 per ton, compared with the $52 per ton fee charged by facilities in Rhode Island.

In early December of 1996, Stonington began to investigate the possibility of a municipal takeover of the function of commercial waste collection and disposal. A consultant retained for the purpose of studying options available to Stonington suggested that the municipality: (1) assume responsibility for collecting all commercially generated solid waste; (2) contract with one or more private haulers to make the collections; (3) require that the contractors take the waste to Preston; and (4) impose a special assessment on the generators of the waste to recover the cost of the program. The consultant noted that lower tipping fees might be the only thing necessary to get the private haulers to dump at Preston voluntarily. However, his report pointed out that such lower fees would have to be subsidized with tax dollars, and that, in any event, this measure would not guarantee that solid waste would be taken to Preston.

By March of 1997, little of Stonington's commercial waste was being delivered to the Preston incinerator. Town officials believed that if action were not taken, Stonington would lose all remaining commercial waste to disposal sites other than Preston. Therefore, the officials considered three options: (1) take no action and fund the shortfall in the minimum commitment through a tax increase of

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4/ Presumably Stonington's flow control ordinance was repealed subsequent to the Connecticut Carting ruling.

about $500,000;[5] (2) lower the tipping fee paid by private haulers to meet the market price by subsidizing the Preston fee through tax increases imposed on the general public; or (3) assume control over waste collection either by hiring municipal employees and purchasing equipment or by using private contractors. Based on the recommendation outlined by their consultant, Stonington officials concluded that the Town should assume the function of collecting commercial solid waste and use private haulers since it would (1) allow the Town to control the disposal of its solid waste without imposing a tax increase; (2) ensure disposal at a facility that possessed the proper permits and was properly operated, thereby avoiding the possibility of CERCLA liability; and (3) provide an equitable volume-based user fee for generators of commercial solid waste. Town officials were particularly wary of any option that resulted in a general tax increase because, in effect, this would shift much of the cost of commercial disposal to residents, who were already paying for disposal of their own waste through the purchase of special town garbage bags. From April through June of 1997, as an interim measure, the Town subsidized the difference between the tipping fee charged at Preston and the overall market price of $57.50 per ton. The subsidy resulted in delivery to Preston of most of the commercial solid waste generated in Stonington.

5/ Based on an annual shortfall of 6,000 tons (the entire amount of commercial waste estimated to be collected in Stonington), it would cost nearly $40,000 per month for the Town to meet its obligations. Therefore, the total annual cost would be $480,000.

Assuming no change in the Preston tipping fee or the market price, this subsidy program would have cost Stonington's taxpayers about $260,000 for fiscal year 1998.[6]

On April 10, 1997, Stonington's Board of Selectmen voted unanimously to convene a Special Town Meeting on April 21 of the electors and citizens qualified to vote. The purpose of the meeting was to consider and act on a resolution to adopt an ordinance that provided for a municipal takeover of the waste collection function. Public informational meetings concerning the ordinance were held on April 14, 15 and 16. At these meetings, private haulers were provided with information about the ordinance and were given an opportunity to make objections. After a discussion of its pros and cons, the ordinance was adopted by a vote taken at the Special Town Meeting held on April 21, 1997.

Stonington's waste management plan, which is comprised of the ordinance and contracts between the Town and one or more waste-hauling companies, was modeled after: (1) an ordinance and a government contract that were a part of the waste management plan of the Town of Babylon, New York; and (2) a government contract for waste-hauling services entered into by the Town of Smithtown in New York, all of which we have previously held not violative of the Commerce Clause. See SSC Corp. v. Town of Smithtown, 66 F.3d 502 (2d Cir. 1995), cert.

6/ Defendants-appellees estimate that implementation of a subsidy program would result in 12,000 tons of commercial solid waste per annum being delivered to the Preston facility. At a tipping fee of $79 per ton, the per ton subsidy would be $21.50, resulting in a cost of $258,000.

denied, 116 S. Ct. 911 (1996); USA Recycling, Inc. v. Town of Babylon, 66 F.3d 1272 (2d Cir. 1995), cert. denied, 116 S. Ct. 1419 (1996). The Stonington ordinance created the Authority to implement the waste management plan, and designated the Town's Board of Selectmen as the Authority. The ordinance further provides that, effective July 1, 1997, the Authority or collectors with whom the Authority contracts will remove, transport and dispose of solid waste. The ordinance prohibits all others from removing, transporting or disposing of solid waste, and imposes a fine of up to $5,000 for each violation. Following adoption of the ordinance, the Authority sought bids from private waste haulers by publishing requests for proposals in local newspapers and national trade publications. The Authority indicated that in choosing among contractors it would consider several criteria other than price, including "[e]xperience identical or related to that required under this procurement," and preservation of competition. It intended, to the extent practicable, to provide an opportunity for existing haulers to continue to operate in Stonington.

The Town expected that existing commercial haulers, including Tinnerello, would submit proposals and that at least one of such haulers would continue to provide service in Stonington. However, only three proposals were actually submitted and, of those, one was eventually withdrawn. Plaintiff refused to bid because it believed that the ordinance was unconstitutional. The Authority entered into several contracts with one of the bidders, USA Waste of Connecticut ("USA"). These contracts require USA to deliver Stonington's commercial waste to the Preston facility for processing and have a term of one year.

Accordingly, Tinnerello cannot collect solid waste in Stonington at least until July 1, 1998, upon expiration of the contracts with USA.

On the effective date of the ordinance, Tinnerello had approximately seventy commercial customers in the Town of Stonington. Tinnerello holds written contracts with roughly half of those accounts and has oral agreements with the remainder. Three-quarters of the written contracts provide for an initial term of one year with automatic renewals. The remainder of the written contracts provide for an initial term of two or more years. In June of 1997, Tinnerello's total revenue from commercial accounts in Stonington was about $18,000, representing seven percent of its business when calculated on an annual basis.[7]

On June 20, 1997, Tinnerello commenced this action, seeking both a temporary and a permanent injunction preventing defendants-appellees from enforcing the waste-hauling ordinance. On July 18, 1997, following an evidentiary hearing, the district court denied preliminary injunctive relief by oral ruling during a telephonic conference. The court concluded that Tinnerello had established neither a risk of irreparable harm nor a likelihood of success on the merits with respect to either its Contract Clause or Commerce Clause claim. To facilitate appeal, the district court prepared a written

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7/ Although there is testimony that the loss of Tinnerello's commercial accounts resulted in a loss of one quarter of its gross income, we cannot conclude that the district court's finding as to the loss was clearly erroneous. See generally Warner-Lambert Co. v. Northside Dev. Corp., 76 F.3d 3, 6 (2d Cir. 1996).

Memorandum Opinion dated August 26, 1997, explaining the basis for its decision in greater detail. In its written opinion, the court observed that Tinnerello could have foreseen that the Town would undertake to provide municipal waste collection services for two reasons: (1) Tinnerello's contracts were subject to the express authority given to all Connecticut municipalities to "[p]rovide for or regulate the collection and disposal [of waste] by contract or otherwise;" and (2) the Connecticut Carting decision striking down East Lyme's flow control ordinance in December of 1995 put Tinnerello on notice that the members of the SCRRRA would need to find an alternative means of satisfying their minimum commitments to the Preston facility. The court also noted that the "ordinance serves significant public purposes by providing for safe and efficient collection and disposal of solid waste on an equitable user-fee basis[; it] accomplishes these purposes in a manner that is reasonable and appropriate." This appeal followed.

DISCUSSION

A. Standard for Deciding a Motion for Preliminary Injunction

In order to justify the award of a preliminary injunction, the moving party must demonstrate that it is likely to suffer irreparable harm in the absence of the requested relief. See, e.g., NAACP v. Town of East Haven, 70 F.3d 219, 223 (2d Cir. 1995). The movant also must demonstrate either (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits to make them fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief. See id. However, in a case in

which "the moving party seeks to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme," the injunction should be granted only if the moving party meets the more rigorous likelihood of success standard. Plaza Health Lab., Inc. v. Perales, 878 F.2d 577, 580 (2d Cir. 1989).

In the present case, it seems clear that the Town of Stonington, by enacting an ordinance for the purpose of "providing for safe and efficient collection of solid waste," was acting in the public interest. This was the conclusion of the district court, and we find no basis to disagree with it. Therefore, in order to prevail, Tinnerello must establish irreparable harm and a likelihood of success on the merits.

B. Standard of Review

We review the district court's denial of a preliminary injunction for abuse of discretion. See Bery v. City of New York, 97 F.3d 689, 693 (2d Cir. 1996), cert. denied, 117 S. Ct. 2408 (1997); see also Gillespie & Co. v. Weyerhaeuser Co., 533 F.2d 51, 53 (2d Cir. 1976)(per curiam). An abuse of discretion occurs, inter alia, when the district court applies the wrong legal standard or bases its decision on clearly erroneous findings of fact. See Warner-Lambert Co. v. Northside Dev. Corp., 86 F.3d 3, 6 (2d Cir. 1996). We address first the issue of whether Tinnerello has demonstrated a likelihood of success on the merits with respect to either its Contract Clause or Commerce Clause claim.

1. The Contract Clause Claim

Article I, Section 10 of the Constitution provides in pertinent part: "[N]o State shall . . . pass any . . . Law impairing the Obligation of Contracts." We have recognized that "[s]tates violate the Contract Clause when legislative action interferes with existing contractual relations." Kinney v. Connecticut

Judicial Dep't, 974 F.2d 313, 314 (2d Cir. 1992)(per curiam). Though the Contract Clause is phrased in absolute terms, the Supreme Court has not interpreted the Clause absolutely to prohibit the impairment of either private or government contracts. See United States Trust Co. v. New Jersey, 431 U.S. 1, 21 (1977)("Although the Contract Clause appears literally to proscribe any impairment, this Court [has] observed that the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula." (quotation omitted)); see also Sanitation and Recycling Indus. v. City of New York, 107 F.3d 985, 992 (2d Cir. 1997). Rather, the Supreme Court teaches that there is a need to harmonize the command of the Clause with a state's police power to protect its citizens.[8] See United States Trust, 431 U.S. at 21. The Court also teaches that the Clause is not violated unless the impairment is a substantial one. See General Motors Corp. v. Romein, 503 U.S. 181, 186 (1992).

Following the direction of the Supreme Court, we have held that claims brought under the Contract Clause require consideration of three factors: (1) whether the contractual impairment is in fact substantial; if so, (2) whether the law serves a significant public purpose, such as remedying a general social or economic problem; and, if such a public purpose is demonstrated, (3) whether the

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8/ The Court has described the police power as "an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, [which] is paramount to any rights under contracts between individuals. Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 241 (1978).

means chosen to accomplish this purpose are reasonable and appropriate.

Sanitation and Recycling Indus., 107 F.3d at 993 (holding that a New York City ordinance enacted to eradicate vestiges of criminal control in the carting industry did not violate the Commerce Clause).

a. Substantial Impairment

Tinnerello contends that it carried its burden of proving substantial impairment of its contractual relations with various commercial customers operating in Stonington. The district court assumed arguendo that Tinnerello could make a sufficient showing of substantial impairment and proceeded with the remainder of the sequential analysis of Tinnerello's likelihood of success. Because certain facts material to a determination of the issue of substantial impairment are unavailable in the record, we decline to pass on the issue as well. However, we are of the opinion that there is a serious question whether Tinnerello can prove that the impairment is a substantial one.

It is undisputed that contractual relationships exist between Tinnerello and various commercial enterprises within Stonington for collection and disposal services. It is also readily apparent that the contractual relationships between Tinnerello and its customers have been impaired by virtue of the challenged ordinance. When Stonington decided to take over waste collection and disposal, it fundamentally altered the relationship between Tinnerello and the Town's generators of commercial waste. Prior to the enactment of the ordinance, many of such generators were customers of Tinnerello. However, after the effective date of the ordinance, the Town (acting through the Authority) became the only possible customer of the

commercial waste hauler(s) that submitted successful proposals. Tinnerello could no longer enforce its waste hauling contracts.

The issue of whether the impairment here is substantial must be examined in light of our decision in Sanitation and Recycling Indus.. There, we held that the primary consideration in determining whether the impairment is substantial is the extent to which reasonable expectations under the contract have been disrupted. 107 F.3d at 993 ("Impairment is greatest where the challenged government legislation was wholly unexpected. When an industry is heavily regulated, regulation of contracts may be foreseeable."). If the plaintiff could anticipate, expect, or foresee the governmental action at the time of contract execution, the plaintiff will ordinarily not be able to prevail. See Veix v. Sixth Ward Bldg. & Loan Ass'n, 310 U.S. 32 (1940). On the record before us, it is not clear when the various contracts were executed. Accordingly, it would be difficult for us to conclude what Tinnerello should have expected at the time its contracts were executed. To the extent that the contracts were executed subsequent to the enactment of certain state law provisions reserving for all Connecticut municipalities the power to regulate and/or conduct waste collection and disposal, Tinnerello's claim that the ordinance was unexpected is less potent and, accordingly, so too is its claim of substantial impairment. See Conn. Gen. Stat. §7-148(c)(4) (H) (stating that all Connecticut municipalities have the power "to provide for . . . the collection and disposal of garbage, trash, rubbish, [and] waste . . . by contract or otherwise."); see also Conn. Gen. Stat. §§ 7-273bb(9) and (12) (granting municipalities a wide variety of powers concerning solid waste management and disposal, including the power to

charge fees for "waste management services" and the power "to do all things necessary for the performance of its duties . . . and the conduct of a comprehensive program for solid waste disposal and resource recovery, and for solid waste management services").

Tinnerello contends that the ordinance constitutes a substantial impairment of its contracts because it provided for no grace period. In Sanitation and Recycling Indus., we held that "[a]lso relevant to the determination of the degree of impairment is the extent to which the challenged provision provides for gradual applicability or grace periods." 107 F.3d at 993 (quotation omitted). Accordingly, while Tinnerello is correct that the lack of a grace period is a relevant factor, we do not consider it dispositive in this case in light of the foregoing.

b. Significant Social or Economic Purpose

Assuming, arguendo, that Tinnerello's contractual relations were substantially impaired, we turn now to the issue of whether the challenged ordinance serves a significant social or economic purpose. Tinnerello argues that the district court erred in finding that the ordinance was justified by a significant public purpose. We consider that Stonington's stated goals of safety, efficiency and equity in designing and implementing a waste management system are wholly legitimate. Although the Town's initial enactment of a flow control ordinance in order to provide a safe and efficient disposal operation may have been a constitutionally infirm means, the objective of safe and efficient waste disposal undoubtedly is a legitimate public goal. Imposing the costs of solid waste disposal on an equitable, user-fee basis rather than utilizing general tax revenue is also a legitimate public goal. For example, In USA Recycling, Inc., we noted:

The Town's imposition of benefit assessments and user fees within the District has the legitimate nonprotectionist goal of apportioning the costs of providing services to that district in an equitable manner.

66 F.3d at 1286.

Tinnerello further contends that "[t]he facts simply do not support a finding that the purpose of the ordinance related to safety, efficiency or equity. Rather, . . . the sole purpose of the ordinance was to impermissibly direct waste and revenue to a favored facility." We reject this contention. The ordinance challenged in the instant case clearly was enacted in furtherance of the Town's safety, efficiency and equity concerns. It helped the Town ensure that solid waste would be delivered to an incinerator possessing the proper permits rather than to incinerators of dubious quality or to landfills. Not only did this prevent contamination, but it also provided some assurances that the Town would not be at risk for CERCLA liability.

Finally, by ensuring against defaults on the bonds that financed the Preston facility and by making unnecessary a significant governmental subsidy of the tipping fees charged by Preston, the ordinance also served important economic interests. The Supreme Court has held that the economic interest of the state alone may be sufficient to provide the necessary public purpose under the Contract Clause. See City of El Paso v. Simmons, 379 U.S. 497 (1965). In Simmons, the Court held that the "economic interests of the state may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts." 379 U.S. at 508 (quotation and citation omitted).

c. Reasonable Means

If the legislative purposes behind the law or regulation are valid, the final inquiry is whether the means chosen to achieve those purposes are reasonable and necessary. See Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 412-13 (1983). We must accord substantial deference to the Town's conclusion that its approach reasonably promotes the public purposes for which the ordinance was enacted. As the Supreme Court in Energy Reserves instructed, "Unless the State itself is a contracting party . . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." Id. (quotation and citation omitted); see also Condell v. Bress, 983 F.2d 415, 418 (2d Cir. 1993).

Tinnerello argues that the ordinance was not rationally related to any of the alleged public purposes for which it was passed. Citing the fact that the Preston facility is priced higher than other available facilities, Tinnerello argues that there is no rational relationship between the ordinance and "efficiency." We disagree. In arguing that the means chosen by the Town to accomplish its legitimate goals are not reasonable and necessary because the rates charged by Preston are higher than the market price, Tinnerello misses the mark. First, the fact that Preston charges a higher tipping fee does not prove that the Town's waste management plan is inefficient. Second, it is not the province of this Court to substitute its judgement for that of either a legislative body or a body of citizens acting by referendum by determining that there might have been a more appropriate method by which to collect and dispose of waste in Stonington.

Similarly, Tinnerello argues that the concern of Town officials about having to raise taxes "could have been addressed by an adjustment to the budget."

Alternatively, it contends that the Town should have legally challenged the "minimum commitment" requirement of its contract as illegal flow control. We disagree. The Town need not prove its choice the best among the available alternatives; rather, Tinnerello must prove that there is no rational relationship between the Town's ends and its means. Merely contending that there was a better way, Tinnerello has not carried its burden.

We conclude that a review of the record does not indicate that the Town acted unreasonably. It considered the alternatives and decided to take over collection and disposal of refuse as a municipal function. The Town settled on a plan by which private haulers could continue to operate as contractors of the Town. It solicited bids from haulers and took into account various factors, including past experience in Stonington.

Accordingly, we conclude that Tinnerello is not likely to succeed on the merits of its claim that the Town's ordinance violates the Contract Clause.

2. The Commerce Clause Claim

Finally, we reject the contention that Tinnerello was entitled to a preliminary injunction against implementation of Stonington's waste management plan on the ground that such plan violates the so-called "dormant" Commerce Clause, which limits the ability of states to regulate interstate commerce absent express congressional authorization. See SSC Corp., 66 F.3d at 508-09.

Stonington's waste management plan was modeled after the ordinance and contract implemented in Babylon, New York and the contract entered into in Smithtown, New York, which we have found to be consistent with the Commerce Clause. See SSC Corp., 66 F.3d 502; see also USA Recycling, Inc., 66 F.3d 1272. We find no basis for concluding

that the provisions of the waste management plan in this case are distinguishable from the provisions that we have previously upheld.

To determine whether a state or municipal activity violates the dormant Commerce Clause, the Supreme Court has instructed that we undertake two separate inquiries. First, we must determine whether the state is "regulating" the market, as opposed to merely "participating" in it. See Reeves, Inc. v. Stake, 447 U.S. 429, 436-39 (1980); see also USA Recycling, Inc., 66 F.3d at 1281. If the state activity constitutes only market participation, then the Commerce Clause does not apply and our inquiry ends there. See id. If the state activity constitutes market regulation, then the court must proceed to a second inquiry: whether the activity regulates the market evenhandedly with only incidental effects on interstate commerce, or discriminates against commerce by treating in-state interests preferentially. See id. "Non-discriminatory regulations that have only incidental effects on interstate commerce are valid unless 'the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.'"[9] Id. (quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)).

Like the Town of Babylon in USA Recycling, Inc., Stonington is both a market participant and market regulator. As defendants-appellees concede, when

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9/ Incidental burdens include the following: disruption of interstate travels and shipping due to lack of uniformity in state laws, impacts on commerce beyond the borders of the state, or burdens that fall more heavily on out-of-state interests. *See USA Recycling, Inc.*, 66 F.3d at 1286.

Stonington passed the ordinance, it was engaged in market regulation rather than market participation.[10] However, consistent with the government contracts at issue in SSC Corp. and USA Recycling, Inc., the contract entered into between Stonington and USA providing for waste-hauling services represents market participation. In effect, Stonington has purchased garbage hauling services from USA. In so doing, Stonington "acts as a buyer in the market for incinerating services when it uses tax dollars to repay municipal bonds." USA Recycling, Inc., 66 F.3d at 1291. We have concluded that a buyer of disposal services can dictate by contract where its contractor disposes of such waste without violating the Commerce Clause. See SSC Corp., 66 F.3d at 510 ("To the extent that a state is acting as a market participant, it may pick and choose its business partners, its terms of doing business and its business goals -- just as if it were a private party."). Accordingly, we hold that the contract between Stonington and USA constitutes permissible market participation that is non-violative of the Commerce Clause.

However, having concluded that the passage of the

10/ A state or local government's actions constitute market participation only if a private party could have engaged in the same activity. See USA Recycling, Inc., 66 F.3d at 1282. By replacing the private market for commercial waste collection through use of an agent or agents, Stonington has exercised its exclusively governmental powers in two ways: (1) it statutorily provided that the only private haulers permitted to collect commercial waste within the municipality were those with whom the Authority contracted; and (2) it established hefty fines for any violations of this provision

challenged ordinance constitutes market regulation, we must decide whether the ordinance discriminates against commerce. Tinnerello contends that the Town's ordinance is no different from the ordinance that we struck down in SSC Corp.. Specifically, it argues that the Town's ordinance discriminates against interstate commerce because it was designed to benefit a single preferred facility. We disagree. First, Tinnerello overlooks the fact that the ordinance that we struck down in SSC Corp. was a flow control ordinance under which a municipality required local garbage haulers to buy processing or disposal services from a local facility. In the present case, the entities generating waste buy collection or disposal services solely from the Town. The Town then uses its discretion to dump the waste in what it deems to be an appropriate location. Moreover, the Town has not favored in-state haulers over out-of-state competitors. It sought bids from local firms as well as those operating around the nation by placing requests for proposals in local newspapers as well as national trade publications. In fact, the contractor that secured the contract, USA, is a national company rather than a local one. Since it appears that Stonington's waste management plan imposes no greater burdens on nonlocal firms than it places on local firms, we conclude that it is unlikely that Tinnerello can establish a violation of the Commerce Clause by the Town on the facts before us. We agree with the district court's view that Tinnerello failed to establish a likelihood of success on its Commerce Clause claim.

Because Tinnerello has failed to show a likelihood of success on the merits of either of its two claims, we need not address the issue of whether it has demonstrated irreparable harm.

CONCLUSION

We have considered Tinnerello's remaining contentions, and we find them all to be without merit. In accordance with the foregoing, we affirm the district court's order denying injunctive relief.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

SAL TINNERELLO & SONS, INC.,	:	
	:	
Plaintiff,	:	
	:	
V.	:	CASE NO.
	:	3:97CV1273
TOWN OF STONINGTON,	:	(RNC)
STONINGTON RESOURCE	:	
RECOVERY AUTHORITY and	:	
DONALD R. MARANELL, First	:	
Selectman,	:	
	:	
Defendants.	:	

MEMORANDUM OPINION ON PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Plaintiff's motion for a preliminary injunction preventing the Town of Stonington from enforcing its solid waste ordinance was denied by an oral ruling placed on the record during a telephone conference with counsel on July 18, 1997. The oral ruling was intended to provide an adequate explanation of the basis for the decision as required by Fed. R. Civ. P. 52. However, at the end of the telephone conference, I told the parties that if plaintiff decided to pursue an appeal, I would prepare a written ruling. Plaintiff has filed a notice of appeal and requested expedited review. Accordingly, this document is being prepared to explain the basis for my decision in greater detail.

Findings of Fact

1. Plaintiff Sal Tinnerello & Sons, Inc. is a closely-held company that conducts waste hauling operations in a number of towns and cities in southeastern Connecticut.[1] Most of its customers are commercial accounts such as restaurants, gas stations, stores and hotels.[2]

2. On April 21, 1997, the Town of Stonington, acting by its Town Meeting, enacted a solid waste ordinance. The ordinance created the Stonington Resource Recovery Authority (the "Authority") and designated the Town's Board of Selectman as the Authority, as permitted by Conn. Gen. Stat. § 7-273aa(b). The ordinance provided that effective July 1, 1997, all removal, transport and disposal of solid waste in the Town would be done by the Authority or collectors with whom the Authority had contracted. The ordinance prohibits others from removing, transporting or disposing of solid waste and empowers the Authority to fine violators up to $5,000 per violation.

3. Following adoption of the ordinance, the Town published requests for proposals in local newspapers and a national trade publication seeking bids from private waste haulers. The Town stated that in selecting contractors it would consider factors other than price, including preservation of competition, by providing to the extent practicable an opportunity for existing haulers to continue to provide service in the

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1/ Defendants' Exhibit 4 indicates that plaintiff also conducts operations in Rhode Island.

2/ The record provides no indication of the extent of plaintiff's residential business.

Town. The Town specifically noted that selection of contractors would be based on multiple criteria. The first factor listed was: "Experience identical to or related to that required under this procurement."

4. The Town expected that existing haulers, including plaintiff, would submit proposals and that more than one of them would continue to provide service in the Town. However, only three bids were actually submitted and one of those was eventually withdrawn. Plaintiff chose not to bid because it believed the ordinance was illegal. In June, the Authority entered into several contracts with the successful bidder, USA Waste of Connecticut, Inc. ("USA Waste"), an affiliate of one of the largest waste haulers in the country. The contracts have a term of one year.

5. On June 20, 1997, plaintiff commenced this action seeking a temporary and permanent injunction preventing the Town from enforcing the ordinance. Plaintiff claims that the ordinance has the effect of terminating its contracts with Stonington customers in violation of the Contract Clause, U.S. Const. Art. I, § 10.[3]

6. The challenged ordinance was enacted to assist the Town in meeting its obligations as a member of the Southeastern Connecticut Regional Resources Recovery Authority ("SCRRRA"), a quasi-public agency composed of the Town of Stonington and other towns, relating to the Resources Recovery

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3/ The complaint pleads other claims but plaintiff's motion for a preliminary injunction is based on its claim under the Contract Clause.

Facility in Preston, Connecticut, an incinerator that was constructed with funds derived from a sale of bonds issued by the Connecticut Resources Recovery Authority (CRRA). In 1973, the Connecticut General Assembly created the CRRA to develop incinerator facilities like the one in Preston as alternatives to Landfills. Pursuant to the State Solid Waste Management Plan, CRRA has constructed six such facilities. The members of SCRRRA, including the Town of Stonington, undertook to provide for construction and operation of the Preston facility because they needed a safe and effective means of disposing of municipal solid waste and the State Solid Waste Management Plan called for use of incinerators rather than landfills. The Preston incinerator was designed and financed based on calculations of the total amount of solid waste that would be generated in the Town of Stonington and other towns that belong to SCRRRA. Like the other resource recovery facilities that have been developed pursuant to the State Solid Waste Management Plan, the Preston incinerator burns solid waste to produce energy that can be sold to electric power utilities.[4]

7. The Town's obligations relating to the Preston incinerator are set forth in a written contract between the Town and SCRRRA dated November 13, 1985. All members of the SCRRRA have signed substantially similar contracts. The contract requires the Town to deliver a minimum amount of solid waste to the Preston facility each year or pay an amount equal to the cost of disposing of that

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4/ The Preston incinerator is owned and operated by a private entity.

portion of the minimum amount that is not delivered. The purpose of the minimum commitment is to ensure a flow of funds to the SCRRRA sufficient to provide for proper operation of the facility and payment of the bond commitments that produced the funds for its construction. The minimum commitment is backed by the Town's full faith and credit.

8. The Town's minimum commitment to the Preston facility is 10,149 tons of solid waste each year. Residential collections in Stonington yield 3,000 to 4,000 tons of solid waste each year. The Town must depend on collections from commercial accounts to provide the balance of approximately 6,000 tons.

9. The contract between the Town and SCRRRA contemplated that the Town would be able to fulfill its minimum commitment by enacting flow control ordinance requiring waste haulers to use the Preston facility, where they would have to pay a tipping fee, which would be credited to the Town's account. The Town adopted a flow control ordinance, as it was contractually bound to do. However, the Supreme Court declared such ordinances unconstitutional under the Commerce Clause in C & A Carbone, Inc. v. Clarkstown, 511 U.S. 383 (1994).

10. In December 1995, Judge Dorsey enjoined enforcement of a flow control ordinance adopted by the Town of East Lyme, another member of SCRRRA, on the ground that the ordinance violated the Commerce Clause. See Connecticut Carting Co. v. Town of East Lyme, 946 F. Supp. 152 (D. Conn. 1995). Plaintiff was a party to that case. In his decision, Judge Dorsey noted:

> Nondiscriminatory alternatives exist for funding East Lyme's obligations including payment by the Town of its SCRRRA obligations out of general tax revenues, collection and disposal of commercial waste by the Town or contracting with a single hauler to collect and dispose of the Town's waste.

Connecticut Carting Co., 946 F. Supp. at 156.

11. After Judge Dorsey's decision, the volume of commercial solid waste delivered to the Preston facility from the Town of Stonington dropped substantially. Private haulers like the plaintiff avoided using the Preston facility because the tipping fees charged there were higher than fees charged elsewhere.[5] In the fall of 1996, the Town's solid waste manager projected that, as a result of the substantial reduction in the volume of commercial solid waste delivered to the Preston incinerator from the Town, the Town would end up 4,000 tons short of its minimum commitment of 10,149 tons over the next year.

12. In early December 1996, the possibility of the Town taking over the function of commercial solid waste collection began to be considered. A study conducted for the Town by an outside consultant found that waste haulers were collecting solid waste from commercial accounts in the Town and disposing of its at places other than Preston, including transfer stations in Rhode Island. The study suggested that the Town could assume responsibility for collecting all commercially

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5/ The record provides no information as to why Preston fees are higher.

generated solid waste, contract with one or more private haulers to make the collections, require that the contractors take the waste to Preston and impose a special tax or assessment on the generators of the waste to cover the cost. The study noted that lower tipping fees might be the only thing needed to get private haulers to go to Preston but pointed out that lower fees would have to be subsidized with tax dollars and would not ensure that the Town's solid waste would be taken to Preston.

13. The Town's solid waste manager, John Phetteplace, believed that unless something was done the Town would lose all its commercial solid waste to disposal sites other than Preston. The resulting shortfall of 6,000 tons in the Town's annual minimum commitment to Preston would cost the Town's taxpayers $40,000 per month. Mr. Phetteplace considered three options: (1) do nothing to alter the flow of commercial solid waste and fund the resulting shortfall in the Town's minimum commitment through a tax increase of 1/2 mil; (2) lower the net cost to private haulers of disposing of solid waste at Preston by subsidizing the Preston fee through tax revenues; and (3) have the Town assume control over municipal waste collection and perform that function either through its own employees or through private contractors. In March 1997, the volume of commercial solid waste delivered to the Preston facility from the Town fell to 11 tons, confirming Mr. Phetteplace's belief that the Town was going to lose all its solid waste to other disposal sites besides Preston.

14. Mr. Phetteplace believed that the Town should assume the function of collecting municipal waste

and use private haulers to do the collections because it would (1) enable the Town to control the disposition of its solid waste without a tax increase; (2) ensure disposal of the waste at a facility that was fully permitted and properly operated, thereby avoiding the possibility of Superfund liability for the Town; (3) and provide an equitable volume-based user fee for generators of solid waste.

15. From April through June 1997, the subsidy approach was used as an interim measure to reduce the shortfall in the Town's minimum commitment. The subsidy resulted in delivery to Preston of most of the commercial solid waste collected in the Town. The amount of the subsidy was $26.50 per ton, which was the difference between the tipping fee of $84.00 per ton charged at the Preston incinerator, and the spot market price of $57.50 per ton. Assuming no change in the Preston fee or the spot market price, the subsidy program would cost the Town's taxpayers more than $200,000 in fiscal year 1998 and require a .26 mil increase.

16. On April 10, the Board of Selectmen voted unanimously to convene a Town Meeting on April 21 to consider and act on a resolution to adopt the challenged ordinance. Informational meetings concerning the ordinance were scheduled for April 14, 15 and 16. Private haulers were provided with information about the ordinance and were given an opportunity to object. The ordinance was adopted at the Town Meeting after the pros and cons of the ordinance were discussed.[6]

6/ The ordinance appears to have been drafted in light of the Second Circuit's decisions in SSC Corp v.

17. On July 1, 1997, the ordinance became effective. Unless the requested injunction is granted, plaintiff will not be permitted to collect solid waste in the Town until at least July 1, 1998, when the Town's contracts with USA Waste of Connecticut, Inc. expire.

18. When the ordinance went into effect, plaintiff had approximately 70 customers in the Town of Stonington. Plaintiff has written contracts with about half those accounts and verbal agreements with the rest. The written contracts are standard form agreements. Three-quarters of them provide for an initial term of one year and have an evergreen provision pursuant to which they are renewed automatically for an additional year unless either side gives timely notice of an intent not to renew. The rest provide for an initial term of two or more years. In addition to its 70 commercial accounts, plaintiff has done roll-off work form the Town, which consists primarily of supplying containers for use as dumpsters at construction sites on a temporary basis. Plaintiff's records shown that in June of this year, its total revenues from its commercial accounts in the Town were approximately $18,000. Crediting the company's claim that it had total revenues in 1996 of about $3.2 million, its commercial accounts in Stonington accounted for about 7 per cent of its

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Town of Smithtown, 66 F.3d 502 (2d Cir. 1995) and USA Recycling, Inc. v. Town of Babylon, 66 F.3d 1272 (2d Cir. 1995), holding that similar management activities by other towns did not violate the Commerce Clause.

business that year.[7]

19. Plaintiff could foresee that the Town would undertake to provide municipal waste collection services. Plaintiff's contracts were subject to express authority given to all Connecticut municipalities to "[p]rovide for or regulate the collection and disposal" of waste "by contract or otherwise." Conn. Gen. Stat. § 7-148(c)(4)(H). Moreover, Judge Dorsey's decision striking down East Lyme's flow control ordinance in December 1995 put plaintiff on notice that the members of the SCRRRA needed to find another way to satisfy their minimum commitments to the Preston facility and could undertake to provide municipal solid waste collection.

20. In framing the challenged ordinance, the Town considered the interests of existing haulers whose contracts would be affected by the municipal takeover and took steps to protect their interests against unreasonable impairment. The ordinance was framed to enable the Town to contract with up to three different haulers of commercial waste by creating two commercial districts for collection of other waste. The Town solicited competitive bids and emphasized that existing haulers would have an advantage over others because of their experience providing service in the Town. If plaintiff had submitted a competitive bid, it might well have received a contract for one of the commercial

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7/ The record does not provide a basis for determining the amount of revenue plaintiff has derived from roll-off business in Stonington in the past or would probably earn from roll-off business in the Town in the future.

districts.

21. The Town also took the interests of existing haulers into account by considering alternatives to the ordinance. The no action alternative was rejected as inferior to the ordinance because it provided no control over disposal of the Town's waste, would cost the town $480,000 in the next fiscal year and would require residential taxpayers to pay for collection and disposal of their own garbage on a user fee basis while also paying for collection and disposal of commercial waste through an increase in their property taxes. The subsidy alternative was rejected as inferior to the ordinance because it would cost approximately $250,000 in the next fiscal year, leave the Town at the mercy of the spot market and require residential taxpayers to pay for the collection and disposal of commercial waste.[8]

CONCLUSIONS OF LAW

1. Because plaintiff seeks to enjoin governmental action taken in the public interest pursuant to a statutory scheme, it must establish a likelihood of success on the merits and a risk of irreparable harm. NAACP v. Town of East Haven, 70 F.3d 219, 223 (2d Cir. 1995).

2. Plaintiff has failed to demonstrate that it is likely to succeed on the merits. Plaintiff's claim under the Contract Clause requires consideration of three factors: (1) whether the impairment of its contracts is substantial; (2) whether the ordinance serves a

---

8/ There is no evidence that the Town ignored other feasible alternatives.

significant public purpose, such as remedying a general social or economic problem; and, if it does, (3) whether the ordinance is a reasonable and appropriate means of attempting to accomplish that purpose. Sanitation and Recycling Industry, Inc., 107 F.3d 985, 993 (2d Cir. 1997). Even assuming that plaintiff can demonstrate a substantial impairment of its contracts within the meaning of this test, the ordinance serves significant public purposes by providing for safe and efficient collection and disposal of solid waste on an equitable user-fee basis. The ordinance accomplishes those purposes in a manner that is reasonable and appropriate.[9]

3. Plaintiff has also failed to demonstrate a risk of irreparable harm. It is undisputed that the Town could have taken over municipal waste collection without running afoul of the Contract Clause if its provided adequate notice to private haulers. Considering the term of plaintiff's contracts and the

---

9/ Whether the impairment of plaintiff's contracts is substantial depends primarily on the extent to which reasonable expectations have been disrupted. Consideration must also be given to the extent to which the ordinance provides for gradual applicability or grace periods. Sanitation and Recycling Industry, Inc., 107 F.3d at 993. Because the Town's takeover of waste collection was foreseeable by no later than the end of 1995, plaintiff may be unable to show substantial impairment of its contracts, even though the ordinance effectively extinguished the obligations of plaintiff's Stonington customers without providing a grace period beyond July 1, 1997.

foreseeability of the Town's action, advance notice of a year or two would presumably be adequate. Any loss the plaintiff suffers as a result of the termination of its Stonington contracts one or two years earlier than they otherwise would have terminated without violating the Contract Clause can be calculated and remedied by an award of money damages.[10]

For the foregoing reasons, plaintiff is not entitled to a preliminary injunction and the court adheres to its oral ruling of July 18 denying plaintiff's motion for preliminary relief.

So ordered this 26th day of August, 1997.

//s//
Robert N. Chatigny
United States District
Judge

10/ Plaintiff's filings in this court since the oral ruling denying its motion for preliminary injunction indicate that it believes it has not been afforded an adequate opportunity to prove irreparable harm. Plaintiff's counsel voiced that concern during the telephone conference of July 18. In response, I gave plaintiff an opportunity to think about my ruling and invited it to submit a request for reconsideration if it thought it could prove irreparable harm. No such request has been made

A "CONTRACT BETWEEN SOUTHEASTERN CONNECTICUT REGIONAL RESOURCES RECOVERY AUTHORITY AND TOWN OF STONINGTON, A MUNICIPALITY OF THE STATE OF CONNECTICUT"

entered into on November 13, 1985, in pertinent parts provides:

PREAMBLE ...

A. Representations of the Municipality - The Municipality represents that:

***

5. Pursuant to the authority granted it under Chapter 446d and Title 7 of the General Statutes, it is agreeing to deliver or cause to be delivered all of the Acceptable Waste generated within its boundaries to the System, and shall enact an ordinance directing that Acceptable Waste collected within the Municipality by persons other than the municipality be delivered to the System so that the Minimum Tonnage Guarantee of the Municipality can be met.

ARTICLE I - DEFINITIONS
SECTION 101. SPECIFIC DEFINITIONS.

***

"Aggregate Minimum Commitment" shall mean the aggregate of the Minimum Commitments of

all of the Municipalities for any Contract Year.

***

"CRRA" shall mean the Connecticut Resources Recovery Authority, a political subdivision of the State established by the Connecticut Solid Waste Management Services Act, codified of [sic] Chapter 446e of the General Statutes of the State.

"Contract Year" shall mean the twelve month period commencing at 12:01 A.M., prevailing time, on July 1 of each year,...

***

The "Minimum Commitment" of each Municipality shall mean:

(b) for the second Contract Year and each subsequent Contract Year, the amount in tons of acceptable Solid Waste (as hereafter provided) to be delivered by or on behalf of such Municipality to the System which amount is set forth opposite the name of the Municipality in Column A in Exhibit "A" as attached and incorporated herein; provided however, that in the event that the Municipality anticipates that it will not, for good cause established, be capable of satisfying such Minimum Commitment for any subsequent Contract Year, it shall so inform the Authority not later than 180 days prior to the beginning of such Contract Year and the Municipality's Minimum Commitment for such Contract Year shall be such lesser amount in tons of such

acceptable Solid Waste, if any, to be delivered to the System as established by the Authority in its sole discretion. In no event shall the Minimum Commitment of the Municipality be reduced so as to cause, individually or in conjunction with any adjustments by other Municipalities, the Aggregate Minimum Commitment to fall below that Aggregate Minimum Commitment as in effect on the Commercial Operation Date.

Not less than 120 days prior to the commencement of the fourth full Contract Year, the Authority shall adjust the respective Minimum Commitments of each of the Municipalities based upon the actual deliveries of Solid Waste by such Municipalities up to that point in time. The aggregate Minimum Commitment shall not be changed as a result of such adjustment. For the fourth full Contract Year, and thereafter for the duration of the term of this Agreement, the Municipality's Minimum Commitment shall be the amount of Solid Waste so designated by the Authority.

"Service Payments" shall mean, with respect to any Municipality, the amount due the Authority pursuant to this Contract, to pay or provide for the Net Cost of Operation, to be determined by the application of the greater of the Minimum Commitment of such Municipality or the actual tons of Solid Waste delivered by or on behalf of such Municipality and accepted by the System for any period.

"System" shall mean the "Southeast Connecticut Project", not inconsistent with the definition of such term as contained in the Bond Resolution, and including the Facility, transfer station or stations, disposal site or sites and such alternative site or sites for processing or disposal of Solid Waste.

ARTICLE II
SYSTEM AND SERVICES TO BE PROVIDED

Section 201. Responsibility of Authority and Municipality.
(a) The Authority shall in accordance with the terms of this Contract, receive and dispose of Solid Waste from the Municipality.

***

(d) upon the terms and conditions herein stated, the Municipality shall pay the Service Payments and other payments for the disposal of such Solid Waste.

***

ARTICLE III
SERVICE PAYMENTS

Section 301. Service Payments.

(a) The authority will make and impose Service Payments with respect to all Solid Waste accepted from the Municipality, any other municipality, authority, county, person, partnership, fir mor public or private corporation, delivered to and accepted by the Authority in accordance with this Contract. Such Service Payments may and shall at all times be such that the receipt by the Authority of the Aggregate Service Payments and other payments from the Municipalities shall be sufficient to pay or provide for the Net Cost of Operation. The Service Payments applicable to the Municipality shall be

uniform as to rate per ton of Solid Waste for the Municipalities. The Authority will consult with the CRRA in the development of each Annual Budget.

(b) Not less than 180 days prior to the commencement of each Contract Year, the Authority shall develop the Annual Budget for such Contract Year, which shall include: (1) an estimate of the Aggregate Service Payments to be paid by all of the Municipalities; (ii) an estimate of the Service Payments to be paid by the Municipality; and (iii) the per ton fee to be charged by the Authority. The Authority shall submit such information within the specified time to the CRRA and to the Authorized Representative of the Municipality.

(c) The Municipality, after the receipt of such estimate, shall make all budgetary and other provisions of appropriations necessary to provide for and to authorize the payment by the Municipality to the Authority of the Service Payments as so estimated as the same become due and payable. Service payments as so determined shall remain in effect for each Contract Year; provided, however, that if the annual Aggregate Service Payments and other payments are less than or greater that the Net Cost of Operation for such Contract Year, then the Authority shall determine such difference and include such difference in the Annual Budget for the next succeeding Contract Year.

(d) All Service Payments and other payments of the Municipality under this Contract shall be deemed to be current operating expense of the Municipality.

(e) The Municipality shall be obligated to make Service Payments pursuant to this Contract for the Authority's services of accepting Solid Waste delivered by the Municipality pursuant to this Contract.

ARTICLE V
MISCELLANEOUS

Section 501. Effective Date and Duration of Contract.

***

(b) The term of this Contract and each and every provision hereof shall remain in full force and effect so long as any Bond or Bonds or any sums for interest or principal thereon remain outstanding. The last installment of principal on such Bond or Bonds shall become due not later than thirty (30) years from the effective date of this Contract.

***

Section 503. Obligation of Municipality to Make Payments.

The Municipality hereby pledges the full faith and credit of the Municipality for the payment of all Service Payments to be made pursuant to this Contract and any other payments including delayed-payment charges and costs and expenses of the Authority, and its representatives in collecting overdue payments to be made by the Municipality under this Contract. The Municipality agrees that its obligation to make any such Service Payments and such other payments in the amounts and at the times herein specified, whether to the Authority or the Trustee, shall be absolute and unconditionaol, shall not be subject to any setoff, counterclaim, recoupment, defense (other than payment itself) or other right which the Municipality may have against the Authority, the Trustee or other person whatsoever, shall not be affected by any defect in

title, compliance with the plans and specifications, condition, design, fitness for use of, or any damage to or loss or destruction of, the System or any part thereof, or by any interruption or cessation in the possession, use or operation of the System or any part thereof by the Authority or the Operator for any reason whatsoever, except that the Municipality shall not be obigated to make Service Payments if the Authority does not render the service of accepting Solid Waste delivered by the Municipality pursuant to this Agreement.

***

Section 505. Levy of Taxes and Cost Sharing or Other Assessment.

To the extent that the Municipality shall not make provisions or appropriates necessary to provide for and authorize the payment by the Municipality to the Authority of the payments required to be made by it hereunder, the Municipality shall levy and collect such general or special taxes or cost-sharing or other assessments as may be necessary to make such payments in full when due hereunder.

***

EXHIBIT A

SOUTHEASTERN CONNECTICUT RESOURCE RECOVERY PROJECT

COMMITMENT OF MINIMUM TONNAGE BY MUNICIPALITY

1. As defined in Section 101 of the Municipal Solid Waste Management Services Contract between this Municipality and the Southeastern Connecticut Regional Resources Recovery Authority dated November 13, 1995, and as mutually agreed upon by this Municipality and the Authority, this document establishes the Minimum Commitment of the Town of Stonington to be 10,800 tons per year.

"TOWN OF STONINGTON SOLID WASTE ORDINANCE,"

adopted April 21, 1997 and effective May 12, 1997, in pertinent parts provides:

***

"Section 2. CREATION OF A RESOURCE RECOVERY AUTHORITY.

Pursuant to Section 7-273aa and 7-273ooo of the Connecticut General Statutes, inclusive, there is hereby created a municipal resource recovery authority, to be known as the "Town of Stonington Resource Recovery Authority," Pursuant to Section 7-273aa(b) of the Connecticut General Statutes, the Board of Selectmen of the Town of Stonington are hereby designated to be the Resource Recovery Authority for the Town and in such capacity they shall have all those rights, power and duties set forth in the Connecticut General Statutes relating to municipal resource recovery authorities.

The Board of Selectmen, acting in its capacity as the Town of Stonington Resource Recovery Authority, shall have the power to adopt resolutions, rules and regulations and to set rents, fees or charges as may be necessary to effectuate the purposes of this Ordinance. Copies of any such resolutions, rules and regulations, and the amount of any such rents, fees or charges shall be made available upon request at the Town Hall, which shall constitute the principal office of the authority.

The Board of Selectmen shall also have the power to designate, within the Town, one or several

residential and/or commercial improvement districts, and to enter into contracts, or grant franchises, for the provision of solid waste collection, transport and/or disposal services within those districts.

Section 3. COLLECTION AND DISPOSAL BY THE TOWN.

Effective July 1, 1997, the removal, transport and/or disposal of solid waste, as that term is defined in Chapter 446d of the Connecticut General Statutes, shall be managed, supervised and/or performed by the Town of Stonington Resource Recovery Authority or its agent(s) in conformance with such rules and regulations as the Authority has or shall from time to time adopt. Such solid waste generated within the Town shall be removed, transported and/or disposed of only the Authority, or refuse collectors with whom the Authority has contracted or has awarded franchises to. All other persons are hereby prohibited from removing, transporting and/or disposing of solid waste generated within the Town. The Authority may, however, provide by regulation an exception for generators of solid waste to self-transport and self-dispose of such waste.

***

"Section 8. PENALTY.

The Stonington Resource Recovery Authority shall have the power to set and assess penalties for violations of the provisions of this Ordinance. In no case shall such penalties exceed the amount of Five thousand ($5,000) Dollars per violation.

No. 98-69

In The

Supreme Court of the United States

October Term, 1997

SAL TINNERELLO & SONS, INC.,

Petitioner,

vs.

TOWN OF STONINGTON; STONINGTON RESOURCE RECOVERY AUTHORITY and DONALD R. MARANELL, FIRST SELECTMAN,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

ROBERT D. TOBIN
Counsel of Record
THOMAS J. RILEY
SUSAN L. DiMAGGIO
TOBIN, CARBERRY, O'MALLEY, RILEY & SELINGER, P.C.
Attorneys for Respondents
43 Broad Street
New London, CT 06320
(860) 447-0335

Of Counsel:

RICHARD L. BARGER
JOSEPH B. MATHIEU
93 Oak Street
Hartford, CT 06106

147807

(800) 274-3321 • (800) 359-6859

COUNSEL PRESS

QUESTIONS PRESENTED

1. Did the Court of Appeals correctly conclude that the Respondent, the Town of Stonington, may collect solid waste as a municipal function and prohibit others both local and non-local from doing so without violating the Commerce Clause?

2. Did the Court of Appeals correctly conclude that the Town of Stonington may contract as a market participant for collection and disposal of solid waste?

3. Did the Court of Appeals correctly conclude that the action of the Town of Stonington in taking over collection and disposal of solid waste as a municipal function did not violate the Contract Clause?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Cited Authorities	iii
Statement of Jurisdiction	1
Statement of the Case	1
Reasons for Denying the Writ	5
I. The Second Circuit Did Not Depart From Controlling Precedents And Correctly Applied Commerce Clause Principles In The Instant Action.	6
A. Coliection and Disposal of Solid Waste Involve a Core Governmental Function.	6
B. The Town Was a Market Participant Purchasing Collection and Disposal Services.	10
II. There Is No Conflict Between The Circuits.	11
III. The Town Of Stonington's Ordinance And Its Contract With USA Did Not Violate The Contract Clause.	13
Conclusion	16

Page

TABLE OF CITED AUTHORITIES

Cases Cited:

Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978) 15

Association of Surrogates and Supreme Court Reporters v. New York, 940 F.2d 766 (2d Cir. 1991), *cert. denied*, 502 U.S. 1058 (1992) 15

Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County, 112 F.3d 652 (3d Cir.), *cert. denied*, 118 S. Ct. 412 (1997) 11, 12

C&A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994) 2, 5, 8, 10, 11, 12

California Reduction Co. v. Sanitary Reduction Works, 199 U.S. 306 (1905) 6, 7

City of El Paso v. Simmons, 379 U.S. 497 (1965) 15, 16

Condell v. Bress, 983 F.2d 415 (2d Cir.), *cert. denied*, 507 U.S. 1032 (1993) 15

Connecticut Carting Co. v. Town of East Lyme, 946 F. Supp. 152 (D. Conn. 1995) 2

Energy Reserves Group, Inc. v. Kansas Power and Light Co., 459 U.S. 400 (1983) 15

Table of Cited Authorities

Page

Gardner v. Michigan, 199 U.S. 325 (1905) 7

Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934) 16

Sal Tinnerello and Sons, Inc. v. Town of Stonington, 141 F.3d 46 (2d Cir. 1998) 1

SSC Corp v. Town of Smithtown, 66 F.3d 502 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 911 (1996) 3, 6, 8, 9, 10, 12

United States Trust Co. of New York v. New Jersey, 431 U.S. 1, *reh'g denied*, 431 U.S. 975 (1977) 15

USA Recycling, Inc. v. Town of Babylon, 66 F.3d 1272 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1419 (1996) 3, 6, 7, 8, 9, 10, 12

Waste Recycling, Inc. v. Southeast Alabama Solid Waste Disposal Auth., 814 F. Supp. 1566 (M.D. Ala. 1993), *aff'd without opinion*, 29 F.3d 641 (11th Cir. 1994) 12

White v. Massachusetts Council of Constr. Employers, Inc., 460 U.S. 204 (1983) 10

Statutes Cited:

42 U.S.C. § 6901(a)(4) (1995) 7

Table of Cited Authorities

	Page
Cal. Gov't Code § 25827 (West 1993)	7
Conn. Gen. Stat. § 7-148(c)(4)(H) (1997)	7
Conn. Gen. Stat. § 7-273aa(b) (1997)	4
Ill. Rev. Stat. ch. 55, para. 5/5 - 15010, para. 5/5 - 1048 (1993)	8
Mass. Gen. L. ch. 41, § 69D (1998)	7
Me. Rev. Stat. Ann. tit. 38, § 1702 (West 1998)	7, 8
Tex. Health & Safety Code Ann. § 364.034 (West 1996)	8

United States Constitution Cited:

Art. I, § 8	6
Art. I, § 10	6

STATEMENT OF JURISDICTION

Petitioner's jurisdictional statement is complete and correct.

STATEMENT OF THE CASE

This action is an interlocutory appeal arising from denial of the Petitioner's request for a preliminary injunction by the District Court for the District of Connecticut. The Court of Appeals for the Second Circuit affirmed the lower court ruling. *Sal Tinnerello and Sons, Inc. v. Town of Stonington*, 141 F.3d 46 (2d Cir. 1998); Petition for Writ of Certiorari With Appendix (hereinafter "Petition"), A-1 through A-23.

In 1973, the Connecticut General Assembly created the Connecticut Resources Recovery Authority, a quasi-public agency, (hereinafter "CRRA") to develop incinerator facilities as an alternative to landfills. *Petition*, A-3. Six incinerators were constructed at various locations in the State of Connecticut pursuant to the State Solid Waste Management Plan. *Id.* The Respondent, Town of Stonington, along with thirteen other towns in Southeastern Connecticut, are members of the Southeastern Connecticut Regional Resources Recovery Authority (hereinafter "SCRRRA"), a quasi-public agency which constructed the incinerator located in Preston, Connecticut. *Id.*

The incinerator was constructed with funds derived from the sale of bonds issued by CRRA. *Id.* at A-4. Both the Court of Appeals and District Court found that the Town, consistent with the State of Connecticut's solid waste management plan, undertook to participate in the construction of the Preston incinerator in order to provide a safe and efficient means of solid waste disposal for solid waste generated within the Town. *Id.* at A-4, A-27. In November, 1985, the Town entered into a

contract with SCRRRA. *Id.* at A-4. All member municipalities entered into similar contracts. *Id.* The Town's contract with SCRRRA requires the Town to deliver an annual minimum commitment of solid waste to the incinerator or pay an amount equal to the cost of disposing of that portion of the minimum commitment which is not delivered. *Id.* The purpose of the minimum commitment is to guarantee sufficient funds to run the incinerator and pay for the bonds which financed its construction. *Id.* The full faith and credit of the Town backs the commitment. *Id.*

In order to ensure that the Town's garbage went to the Preston incinerator, the Town adopted a flow control ordinance which required all waste haulers collecting within the Town to use the Preston facility. *Id.* at A-5. The garbage delivered and dollars paid were applied against the Town's minimum commitment. *Id.*

In 1994, this Court ruled that flow control ordinances were unconstitutional in violation of the Commerce Clause. *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994) (hereinafter "Carbone"). In December, 1995, the District Court for the District of Connecticut ruled that a slightly different flow control ordinance adopted by the Town of East Lyme, Connecticut, another member of SCRRRA, also was unconstitutional. *Connecticut Carting Co. v. Town of East Lyme*, 946 F. Supp. 152 (D. Conn. 1995). Plaintiff was a party in that action. *Petition*, A-5.

Thereafter, the volume of Stonington waste delivered to Preston dropped substantially. *Id.* Private haulers avoided the Preston facility and disposed of their waste at other places, including transfer stations in Rhode Island, at rates less than those necessary to finance and operate the Preston incinerator. *Id.* at A-5, A-6. By March, 1997, virtually none of the Town's commercial waste was going to the Preston incinerator. *Id.* at A-6.

In early December, 1996, the Town began to study the possibility of the Town taking over the function of commercial collection and disposal of solid waste. Town officials believed that unless something were done the Town would lose all of its commercial waste to disposal sites other than Preston. *Id.* The Town therefore considered three alternatives: (a) do nothing and fund the shortfall in the minimum commitment through a tax increase of approximately $500,000; (b) lower the tip fee paid by commercial haulers to equal the spot market price by subsidizing the Preston fee through the use of tax revenues; and (c) assume control over waste collection by either hiring municipal employees and purchasing equipment or using the contractual arrangement ultimately adopted. *Id.* at A-6, A-7. The Town based consideration of the latter alternative on *USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1419 (1996) (hereinafter "Babylon"), and *SSC Corp v. Town of Smithtown*, 66 F.3d 502 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 911 (1996) (hereinafter "Smithtown"), in which the Second Circuit upheld the constitutionality of two long Island towns' takeover of municipal garbage collection against commerce clause challenges. *Id.* at A-8, A-9.

Ultimately, the Town rejected the no action alternative since it did not meet any of the Town's objectives. It would result in a one half mil tax increase to the taxpayers, assuming that the amount of commercial solid waste delivered to the Preston incinerator stayed at the reduced levels seen in early 1997. *Id.* at A-7. Further, it provided the Town no control over the waste disposal site, and would shift much of the cost of meeting the Town's minimum commitment to the generators of residential waste, who were paying for the cost of collection and disposal of their waste through the purchase of Town garbage bags. *Id.*

From April through June, 1997, the Town subsidized the difference between the tip fee charged at the Preston incinerator,

and the spot market price of $57.50 a ton. *Id.* Even assuming no change in the Preston fee or the spot market price, the subsidy program would cost the Town's taxpayers about $260,000 in fiscal year 1998 and require a .26 mil increase. *Id.* at A-8.

Town officials therefore concluded that the Town should assume the function of collecting municipal waste using private haulers, because it would allow the Town to control the disposition of solid waste without a tax increase, would dispose of the waste at a fully permitted and properly operated facility, and would provide an equitable volume-based user fee for all generators of solid waste. *Id.* at A-7.

On April 10, 1997, the Board of Selectmen of the town voted unanimously to convene a Town meeting to act on a proposed ordinance, which would allow the Town to takeover garbage collection. *Id.* at A-8. The ordinance was adopted at a Town meeting on April 21, 1997. *Id.*

The ordinance created the Stonington Resource Recovery Authority (the "Authority"), and designated the Town's Board of Selectmen as the Authority as permitted by Conn. Gen. Stat. § 7-273aa(b) (1997). *Id.* at A-9. The ordinance provided that, effective July 1, 1997, the Authority or collectors with whom the Authority had contracted would remove, transport and dispose of solid waste. *Id.* It prohibited others from removing, transporting or disposing of solid waste. *Id.*

The Town thereafter widely publicized requests for proposals seeking bids from private waste haulers. *Id.* The Town was interested in preserving competition by providing, to the extent practicable, an opportunity for existing haulers to continue to provide service in the Town. *Id.* The Town therefore considered factors other than price, including

preservation of competition. *Id.* In fact, the first selection criterion in the RFP was experience identical to or related to that required under the procurement. *Id.* The Town expected that existing haulers, including Plaintiff, would submit proposals, and that more than one of them would continue to provide service to the Town. *Id.*

Plaintiff chose not to bid because it believed the ordinance was illegal. *Id.* Three other haulers submitted bids. The Authority entered into several contracts with one of them, USA Waste of Connecticut. *Id.*

On the effective date of the ordinance, Plaintiff had approximately 70 customers in the Town, roughly half of which had written contracts. *Id.* Three quarters of the written contracts provide for an initial term of one year with automatic renewals. *Id.* The remainder of the written contracts provide for an initial term of two or more years. *Id.* In June, 1997, the Plaintiff's total revenue from commercial accounts in the Town was approximately $18,000, representing on an annual basis seven percent of its business. *Id.*

On June 20, 1997, Plaintiff commenced this action seeking a temporary and permanent injunction preventing the Town from enforcing the ordinance. *Id.* The District Court denied preliminary injunctive relief because Plaintiff had failed to establish either a likelihood of success on the merits or irreparable harm. *Petition*, A-35, A-36. The Court of Appeals did not reach the issue of irreparable harm because it concluded that petitioner had not established a likelihood of success on the merits. *Petition*, A-22.

REASONS FOR DENYING THE WRIT

There is no inconsistency between this Court's holding in *Carbone*, and the Second Circuit holdings in the case at bar

and in *Smithtown*, and *Babylon*. The opinion below properly concludes that the Town of Stonington, in creating garbage districts, exercised traditional municipal police power consistent with holdings of this Court regarding the dormant aspect of the Commerce Clause and the market participant doctrine. U.S. Const. art. I, § 8. Moreover, the Court correctly concluded that the action of the Town of Stonington did not violate the Contract Clause. U.S. Const. art. I, § 10.

I.

THE SECOND CIRCUIT DID NOT DEPART FROM CONTROLLING PRECEDENTS AND CORRECTLY APPLIED COMMERCE CLAUSE PRINCIPLES IN THE INSTANT ACTION.

A. Collection and Disposal of Solid Waste Involve a Core Governmental Function.

The Petitioner's blithe suggestion that the Town's actions amounted to legislating a monopoly does little to further constitutional analysis. It has long been recognized that collection and disposal of solid waste is a core governmental function. In *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905), this Court upheld the authority of local governments to establish municipal collection and disposal systems and exclude private interests. Rejecting a due process challenge to San Francisco's collection ordinance, the Court noted:

> [I]t is not the province of courts, except in clear cases, to interfere with the exercise of the power reposed by law in municipal corporations for the protection of local rights and the health and welfare of the people in the community.

199 U.S. at 319. In *Gardner v. Michigan*, 199 U.S. 325 (1905), this Court rejected a takings claim with respect to Detroit's exclusive collection and disposal service.

The present action is the third Second Circuit case recognizing the fundamental right of municipalities to perform collection and disposal of solid waste as a governmental function. In *Babylon*, the Court noted:

> For ninety years, it has been settled law that garbage collection and disposal is a core function of local government in the United States. At their option, cities may provide garbage pick-up to their citizens directly (that is, through town employees or an independent contractor), or they may rely on a closely regulated private market to provide those services.

Babylon, 66 F.3d at 1275. In the Resource Conservation and Recovery Act, Congress specifically provides that "the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies. . . ." 42 U.S.C. § 6901(a)(4) (1995).

States have long recognized that garbage collection and disposal is a core government function. Connecticut law provides that municipalities have the power to: "Provide for or regulate the collection and disposal of garbage, trash, rubbish, waste material and ashes by contract or otherwise, . . ." Conn. Gen. Stat. § 7-148(c)(4)(H) (1997). *See also* Mass. Gen. L. ch. 41, § 69D (1998) (Board of Public Works shall have powers regarding collection and disposal of garbage and refuse); Cal. Gov't Code § 25827 (West 1993) (Board of Supervisors of each county may collect or contract for collection, or both, of garbage, waste, refuse, rubbish). Me.

Rev. Stat. Ann. tit. 38, § 1702 (West 1998); Ill. Rev. Stat. ch. 55, para. 5/5 - 15010, para. 5/5 - 1048 (1993); Tex. Health & Safety Code Ann. § 364.034 (West 1996).

Petitioner's contention that the Second Circuit has misapplied *Carbone* is without merit. In *Carbone*, this Court invalidated a Clarkstown, New York, flow control ordinance which required under threat of penalty that all private haulers deposit their solid waste at a single transfer station designated in the ordinance. This Court held that the ordinance discriminated against interstate commerce by driving up the cost of disposing of out-of-state waste since it had to be handled twice at the plaintiff's and the town's transfer stations and by excluding from the disposal market all except one legally designated local service provider. *Carbone*, 511 U.S. at 389-390. As a result of its discriminatory impact on interstate commerce, the ordinance was subjected to rigorous scrutiny and determined unconstitutional. *Id.* at 392.

The Second Circuit has consistently followed *Carbone*, not only in this matter, but also in *Smithtown* and *Babylon*. The Towns of Stonington, Smithtown and Babylon at one time all had flow control ordinances requiring private haulers of garbage to deliver their solid waste to a designated facility under threat of criminal penalty. In *Smithtown*, the court considered the validity of the Smithtown flow control ordinance. In ruling the Smithtown flow control ordinance invalid, the court concluded:

> Carbone compels us to find that Smithtown's flow control ordinance facially discriminates against interstate commerce because it directs all town waste to a single local disposal facility, to the exclusion of both in-state and out-of-state competitors. Accordingly, Smithtown must

> "demonstrate, under rigorous scrutiny that it has no other means [than its flow control ordinance] to advance a legitimate local interest." *Id.* at __, 114 S. Ct. at 1683.

Smithtown, 66 F.3d at 514.

In *Babylon*, and the present action, the outdated and unconstitutional flow control ordinances were not before the court. Rather than legislating disposal at a specific site, both municipalities here provided by ordinance for a municipal takeover of solid waste collection, by prohibiting anyone except the town or its agents from hauling solid waste within the respective towns. In fact, the court below found:

> Stonington's waste management plan, which is comprised of the ordinance and contracts between the Town and one or more waste-hauling companies, was modeled after: (1) an ordinance and a government contract that were a part of the waste management plan of the Town of Babylon, New York; and (2) a government contract for waste-hauling services entered into by the Town of Smithtown in New York, all of which we have previously held not violative of the Commerce Clause.

Petition, A-8, A-9 (citations omitted).

Stonington's ordinance does not require disposal at any particular site or discriminate against interstate commerce. It prohibits all firms, local and national, from collecting waste within the Town. The court below correctly analyzed the ordinance's impact on commerce. When the Petitioner argues that "[t]he Court below improperly failed to apply heightened

scrutiny to an ordinance which requires disposal at a designated in-state facility," it completely misstates the provisions of the ordinance. *Petition*, at p. 17. The Stonington ordinance simply allows the Town to take over the function of collecting solid waste. Unlike the ordinances in *Carbone* and *Smithtown*, it does not designate a site or require private haulers to take their waste there and thereby discriminate against interstate commerce. The Stonington ordinance eliminates the private collection and disposal markets. It treats both local and non-local firms in exactly the same way.

B. The Town Was a Market Participant Purchasing Collection and Disposal Services.

The court below correctly held that Stonington was a market participant when it purchased collection and disposal services for solid waste. *Petition*, A-20, A-21. Having determined to exercise its authority to collect garbage, Stonington could do so either with municipal employees or by contract. In purchasing the services by contract, Stonington acted as a market participant. Again, the court followed settled precedent in analyzing Stonington's contract.

In *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204 (1983), the City of Boston required all city funded construction contracts to be performed by a work force of at least fifty percent Boston residents. This Court held that the City was a market participant and everyone affected by the provision was "in a substantial if informal sense 'working for the city'." 460 U.S. at 211 n.7. Boston was participating in the market as a purchaser of construction services and free to favor its own citizens. In the present action, the Town of Stonington was similarly a market participant. *See also Smithtown*, 66 F.3d at 510-512; *Babylon*, 66 F.3d at 1288-1291. When a municipality is purchasing services for public

buildings, public roads, street lighting, police vehicles, garbage trucks or garbage collection or disposal services, it is acting as a market participant — free from Commerce Clause scrutiny. Moreover, the Town of Stonington did not discriminate against interstate commerce in its selection of a garbage hauler. The court below specifically noted:

> Moreover, the Town has not favored in-state haulers over out-of-state competitors. It sought bids from local firms as well as those operating around the nation by placing requests for proposals in local newspapers as well as national trade publications. In fact, the contractor that secured the contract, USA, is a national company rather than a local one.

Petition, at A-22.

II.

THERE IS NO CONFLICT BETWEEN THE CIRCUITS.

Petitioner's argument that there exists a conflict between the Second, Third and Eleventh Circuits is erroneous. The most recent case from the Third Circuit, *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County*, 112 F.3d 652 (3d Cir.), *cert. denied*, 118 S. Ct. 412, 413 (1997), dealt with a flow control provision not market participation. By regulation, New Jersey designated specific disposal sites to which all solid waste was required to be delivered. *Atlantic Coast*, 112 F.3d at 658. The Third Circuit applying *Carbone* found that the New Jersey flow control regulations discriminated against interstate commerce. Applying the rigorous scrutiny test, the court determined that the state regulation violated the dormant aspect of the Commerce Clause. *Id.* at 667.

The Eleventh Circuit case merely affirmed without opinion a pre *Carbone* District Court decision dealing with flow control ordinances. *Waste Recycling, Inc. v. Southeast Alabama Solid Waste Disposal Auth.*, 814 F. Supp. 1566 (M.D. Ala. 1993), *aff'd without opinion*, 29 F.3d 641 (11th Cir. 1994). The District Court opinion is consistent with *Carbone*. In *Smithtown*, the Second Circuit rejected the *Waste Recycling* court's reasoning that a town must be motivated by profit making concerns or possess a proprietary interest in the garbage in order to be a market participant. *Smithtown*, 66 F.3d at 516. The District Court in *Waste Recycling* specifically noted that it was not dealing with a municipal takeover of solid waste collection and disposal. *Waste Recycling*, 814 F. Supp. at 1583 n. 22. The Second Circuit would have reached the same result in *Atlantic Coast*, and *Waste Recycling*.

Where faced with a flow control ordinance, the Second Circuit has applied rigorous scrutiny and held it unconstitutional consistent with *Carbone*. *See Smithtown*, 66 F.3d 502. The present action, unlike *Atlantic Coast*, *Waste Recycling*, and *Smithtown*, simply does not involve a flow control regulation. The Town of Stonington took over the collection and disposal of garbage as a municipal function joining cities and towns all over the country. Petitioner's reading of *Carbone* would lead to the conclusion that exclusive municipal garbage collection system is per se unconstitutional. Such a broad reading of *Carbone* finds no historical support.

Significantly, this Court had denied certiorari in *Atlantic Coast*, *Smithtown* and *Babylon*.

III.

THE TOWN OF STONINGTON'S ORDINANCE AND ITS CONTRACT WITH USA DID NOT VIOLATE THE CONTRACT CLAUSE.

The Court of Appeals correctly applied a three part test consistent with this Court's direction to determine whether the Stonington ordinance violated the Contract Clause. *Petition*, A-13. The court noted:

> Following the direction of the Supreme Court, we have held that claims brought under the Contract Clause require consideration of three factors: (1) whether the contractual impairment is in fact substantial; if so, (2) whether the law serves a significant public purpose, such as remedying a general social or economic problem; and, if such a public purpose is demonstrated, (3) whether the means chosen to accomplish this purpose are reasonable and appropriate.

Id. A-13 through A-14. The court concluded that the town's "goals of safety, efficiency and equity in designing and implementing a waste management system are wholly legitimate." *Petition*, A-16. The court also held that the means chosen to achieve those purposes were reasonable and necessary. *Petition*, A-18.

Significantly, Petitioner does not even discuss the standard set forth by the Court of Appeals. Moreover, the Petitioner seeks to retry the facts of the case here. The Petitioner's attempt to characterize the Town's contract with SCRRA as a "bad deal" was specifically rejected by the Court of Appeals. *Petition*, A-18. Merely because the fee at Preston is higher does not

mean it is a bad deal. Likewise, the Petitioner's contention that the Town was motivated solely by fiscal concerns was specifically rejected by both lower courts. The District Court stated that "the ordinance serves significant public purposes by providing for safe and efficient collection and disposal of solid waste on an equitable user-fee basis." *Petition*, A-35.

Similarly, the Court of Appeals rejected the Petitioner's contention. The court held:

> We consider that Stonington's stated goals of safety, efficiency and equity in designing and implementing a waste management system are wholly legitimate. Although the Town's initial enactment of a flow control ordinance in order to provide a safe and efficient disposal operation may have been a constitutionally infirm means, the objective of safe and efficient waste disposal undoubtedly is a legitimate public goal. Imposing the costs of solid waste disposal on an equitable, user-fee basis rather than utilizing general tax revenue is also a legitimate public goal. . . . Tinerello further contends that "[t]he facts simply do not support a finding that the purpose of the ordinance related to safety, efficiency or equity. Rather, . . . the sole purpose of the ordinance was to impermissibly direct waste and revenue to a favored facility." We reject this contention. The ordinance challenged in the instant case clearly was enacted in furtherance of the Town's safety, efficiency and equity concerns.

Petition, A-16, A-17. In short, Petitioner would require heightened scrutiny where a state acts in the general economic interest of its citizens as opposed to impacting its own contracts.

This standard finds no support, and in any event the lower courts found that the Town was not solely motivated by economic reasons.

The Plaintiff's reliance on *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, *reh'g denied*, 431 U.S. 975 (1977), is misplaced. In *United States Trust Co.*, this Court held that when a state impairs the obligation of its own undertaking, Contract Clause analysis stands on a completely different footing. 431 U.S. at 22-23. *See also Condell v. Bress*, 983 F.2d 415 (2d Cir.), *cert. denied*, 507 U.S. 1032 (1993); and *Association of Surrogates and Supreme Court Reporters v. New York*, 940 F.2d 766 (2d Cir. 1991), *cert. denied*, 502 U.S. 1058 (1992), (applying *United States Trust* to the state's own contracts). Similarly, Plaintiff's reliance on *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978) is misplaced. In *Spannaus*, this Court held that the law in question was "not even purportedly enacted to deal with a broad generalized economic or social problem." 430 U.S. at 250. *See also Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 412, n. 13 (1983) (suggesting that the Minnesota pension law in *Spannaus* "may have been directed at one particular employer planning to terminate its pension plan when its collective bargaining agreement expires").

Even though the public purposes served by Stonington are much broader than mere economics, as found by the District Court and affirmed by the Court of Appeals, this Court also has indicated that the economic interest of the state alone may be sufficient to provide the necessary public purpose for Contract Clause analysis. *City of El Paso v. Simmons*, 379 U.S. 497 (1965). The Court held that the "economic interests of the state may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts."

379 U.S. at 508 (quoting *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 437 (1934)). The decision below involves straightforward application of settled law to factual findings which are not clearly erroneous.

CONCLUSION

This Court should deny the writ as to all issues raised in the petition.

Respectfully submitted,

ROBERT D. TOBIN
Counsel of Record
THOMAS J. RILEY
SUSAN L. DiMAGGIO
TOBIN, CARBERRY, O'MALLEY,
RILEY & SELINGER, P.C.
Attorneys for Respondents
43 Broad Street
New London, CT 06320
(860) 447-0335

Of Counsel:

RICHARD L. BARGER
JOSEPH B. MATHIEU
93 Oak Street
Hartford, CT 06106

MOTION FILED
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No. 98-69

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1998

SAL TINNERELLO & SONS, INC.
Petitioner,

v.

TOWN OF STONINGTON; STONINGTON RESOURCE RECOVERY AUTHORITY; AND DONALD R. MARANELL, FIRST SELECTMAN,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

MOTION AND BRIEF OF AMICUS CURIAE BFI WASTE SYSTEMS OF NORTH AMERICA, INC. IN SUPPORT OF PETITIONER

Jerry L. Mitchell, Jr.
BFI Waste Systems of
North America, Inc.
757 N. Eldridge
Houston, TX 77079
(281) 870-7190

Attorney of Record for
Amicus Curiae
BFI Waste Systems of
North America, Inc.

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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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MOTION OF
BFI WASTE SYSTEMS OF NORTH AMERICA, INC.
FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*
IN SUPPORT OF PETITIONER

Movant BFI Waste Systems of North America, Inc. ("BFI") hereby seeks leave to file a brief *amicus curiae* in support of the Petition of Sal Tinnerello & Sons, Inc. for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.[1]

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[1] Petitioners have consented to this *amicus* brief. Counsel for Respondents has informed undersigned counsel of record that he does not oppose the filing of the *amicus* brief.

BFI is one of the nation's largest companies which collects, processes for recycling, transports, and disposes of a wide range of commercial, industrial, medical, and residential solid wastes. As a collector and transporter of solid wastes, BFI is subject to solid waste "flow control" programs and requirements that were developed subsequent to and despite this Court's holding in *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994). In addition, BFI operates 99 landfills in the United States that are or can be adversely affected by the implementation of post-*Carbone* economic flow control schemes such as the one at issue in this case.

BFI and similarly situated businesses experience, on a national scale, the impact of governmental action like that taken by the Respondents in this case. With all due respect to the parties to this case, BFI believes that its broad, national experience and the perspective it has gained from that experience will allow it to be of significant additional assistance to the Court in its consideration of the important national issues raised by the petition.

Respectfully submitted,

Jerry L. Mitchell, Jr.
BFI Waste Systems of
North America, Inc.
757 N. Eldridge
Houston, TX 77079
(281) 870-7190

Attorney of Record for
Amicus Curiae
BFI Waste Systems of
North America, Inc.

August 3, 1998

No. 98-69

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1998

SAL TINNERELLO & SONS, INC.

Petitioner,

v.

TOWN OF STONINGTON; STONINGTON RESOURCE RECOVERY AUTHORITY; AND DONALD R. MARANELL, FIRST SELECTMAN,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

BRIEF OF AMICUS CURIAE BFI WASTE SYSTEMS OF NORTH AMERICA, INC. IN SUPPORT OF PETITIONER

QUESTION PRESENTED

Amicus BFI Waste Systems of North America, Inc. believes that certiorari should be granted on the questions presented in the Petition for Writ of Certiorari. In the interest of judicial economy, those questions are not repeated here.

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED iii

INTEREST OF *AMICUS CURIAE* 1

REASONS FOR GRANTING THE WRIT 1

I. THE STONINGTON ORDINANCE/ CONTRACT SCHEME IS MERELY ONE EXAMPLE OF NUMEROUS ACTIONS UNDERTAKEN SUBSEQUENT TO THIS COURT'S HOLDING IN *CARBONE* THAT HAVE BALKANIZED THE MOVEMENT OF WASTE AND DISRUPTED IMPORTANT REGIONAL MARKETS FOR SOLID WASTE MANAGEMENT SERVICES 2

II. THE DECISION BELOW IS A CLEAR DEPARTURE FROM THIS COURT'S RULING IN *CARBONE* 7

III. THIS CASE PRESENTS AN ISSUE OF CONSIDERABLE IMPORTANCE GIVEN THE THREAT TO THE NATIONAL ECONOMY PRESENTED BY LOCAL FLOW CONTROL MEASURES 13

IV. REVIEW IS NECESSARY IN ORDER TO ENSURE THAT THE CONTRACT CLAUSE IS NOT REDUCED TO A CONSITUTIONAL VESTIGE 14

CONCLUSION 16

TABLE OF AUTHORITIES CITED

Cases

Allied Structural Steel Co. v. Spannaus,
438 U.S. 234 (1978) 15, 16

Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders (Atlantic Coast I),
45 F.3d 701 (3d Cir. 1995) 10

Barker Bros. Waste, Inc. v. Dyer County Legislative Body,
923 F. Supp. 1042 (W.D. Tenn. 1996) 10

Bradley v. Public Utilities Commission,
289 U.S. 92 (1933) 12

Brown-Forman Distillers v. New York State Liquor Auth.,
476 U.S. 573 (1986) 11

Buck v. Kuykendall,
267 U.S. 307 (1927) 12

Camps/Newfound/Owatonna, Inc. v. Town of Harrison,
117 S. Ct. 1590 (1997) 8

C & A Carbone, Inc. v. Town of Clarkstown,
511 U.S. 383 (1994) 1, 2, 3, 6, 8, 16

Condon v. Andino, Inc.,
961 F. Supp. 323 (D. Me. 1997) 11

Container Corp. of Carolina v. Mecklenburg Co.,
1995 WL 360185 (W.D.N.C. June 22, 1995) 4, 11

Eads St. Corp. v. Town of Babylon,
631 N.Y.S.2d 878 (N.Y. App. Div. 1995) 9

Energy Reserve Group v. Kansas Power & Light Co.,
459 U.S. 400 (1983)..... 15

Harvey & Harvey, Inc. v. County of Chester,
68 F.3d 788 (3d Cir. 1995) 9

Healy v. The Beer Institute, Inc.,
109 S. Ct. 2491 (1989)..... 12

Heir's Trucking, Inc. v. Waupaca County,
569 N.W.2d 353 (Wis. Ct. App. 1997)..... 11

Hughes v. Alexander Scrap,
426 U.S. 794 (1976)..... 8

Hughes v. Oklahoma,
441 U.S. 332 (1979).....11, 13

Hunt v. Washington Apple Advertising Comm'n,
432 U.S. 333 (1977)..... 12

J. Filiberto Sanitation, Inc. v. New Jersey Dept. of Environmental Protection,
857 F.2d 913 (3rd Cir. 1988)..... 4

Kassel v. Consolidated Freightways Corp.,
450 U.S. 662 (1981)..... 12

Keystone Bituminious Coal Ass'n v. DeBenedictis,
107 S. Ct. 1232 (1987)..... 15

New Energy Co. v. Limbach,
486 U.S. 269 (1988) 8

Philadelphia v. New Jersey,
437 U.S. 617 (1978) 12

Pike v. Bruce Church, Inc.,
397 U.S. 617 (1970) 12

Reeves v. Stake,
447 U.S. 429 (1980) 8

Southcentral Pa. Waste Haulers Ass'n v. Bedford-Fulton-Huntingdon Solid Waste Authority,
No. 1:CV-93-1318, slip op.
(M.D. Pa. Mar. 23, 1995) 11

South-Timber Development, Inc. v. Wunnicke,
467 U.S. 82 (1984) 8

SSC Corp. v. Town of Smithtown,
66 F.3d 502 (2d Cir. 1995), *cert. denied*,
116 S. Ct. 911 (1996) 3, 7

Sturges v. Crowninsheild,
17 U.S. (4 Wheat.) 122 (1819) 15

Tracy v. Hebron,
No. 4:CV95-3218, slip op. (D. Neb. May 2, 1996) 10

United States Trust Co. v. New Jersey,
431 U.S. 1 (1977) 15, 16

USA Recycling, Inc. v. Town of Babylon, New York,
66 F.3d 1272 (2d Cir. 1995), *cert. denied*,
116 S. Ct. 1419 (1996) 3, 7

Waste Recycling, Inc. v. Southeast Alabama Solid Waste Disposal Authority,
814 F. Supp. 1566 (M.D. Ala. 1993),
aff'd without opinion, 29 F.3d 641 (11th Cir. 1994) 10

Waste Systems Corp. v. County of Martin, Minn.,
985 F.2d 1381 (8th Cir. 1993) 4

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460 U.S. 204 (1984) 8

Other Authorities

56 Fed. Reg. 50,978, 50,989 (1991) 6

Bob Brown, *N.J. Haulers Sue Official*,
Waste News, Sept. 29, 1997 9

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7 Vill. Envt. L.J. 203 (1996) 3

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18 Regulation, 1995, No. 2 5

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Waste News, Nov. 3, 1997 9

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The Cost of Flow Control, May 3, 1995 4

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INTEREST OF *AMICUS CURIAE*

BFI Waste Systems of North America, Inc. ("BFI") is one of the largest companies in the world which collects, processes for recycling, transports, and disposes of a wide range of commercial, industrial, medical and residential solid wastes. BFI is subject to solid waste "flow control" programs and requirements, including provisions and mandates that were developed subsequent to this Court's holding in *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994). BFI has become subject to or threatened with the imposition of franchise or municipal contract-based programs, as described below, similar to the approach implemented by the Town of Stonington, Connecticut ("Stonington").[1]

REASONS FOR GRANTING THE WRIT

Since *Carbone* local governments have in several instances attempted to circumvent this Court's ruling by requiring solid waste haulers to sign contracts obligating them to dispose of collected wastes at designated facilities, as an alternative to denial of a necessary license or permit to operate. Similarly, some jurisdictions have mandated that waste haulers abide by "economic flow control" programs on the basis that such regimes are beyond the scope of the *Carbone* holding. This case presents an unambiguous effort to avoid the clear implications of the *Carbone* decision. In this instance, competition in the waste collection and disposal marketplaces was effectively eliminated. Other jurisdictions outside of Connecticut have taken the same approach, or are considering similar programs. Such schemes adversely affect

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[1] This brief has been authored entirely by counsel for *amicus* BFI, and no other person or entity has made any monetary contribution to its preparation or submission.

commerce and prevent the efficient and environmentally protective disposal of solid waste.

I. THE STONINGTON ORDINANCE/CONTRACT SCHEME IS MERELY ONE EXAMPLE OF NUMEROUS ACTIONS UNDERTAKEN SUBSEQUENT TO THIS COURT'S HOLDING IN *CARBONE* THAT HAVE BALKANIZED THE MOVEMENT OF WASTE AND DISRUPTED IMPORTANT REGIONAL MARKETS FOR SOLID WASTE MANAGEMENT SERVICES.

In *Carbone* this Court held that a flow control ordinance adopted by Clarkstown, New York violated the Commerce Clause. By enacting an ordinance precluding the collection of refuse by entities that have not entered into a contract with the township, and by conditioning the award of collection contracts on the waste hauler's agreement that it will deliver waste to a specific facility, Stonington effectively achieved flow control notwithstanding *Carbone*. In affirming this scheme, the District Court apparently concluded, and the Second Circuit apparently agreed, that this Court's ruling in *Carbone* was strictly limited to instances in which the waste hauler is precluded from delivering collected materials to an out-of-state facility by a licensing ordinance. Unfortunately, Stonington's attempt to interpret *Carbone* in a narrow fashion, so as to justify the retention of its flow control mandates and programs, is far from an isolated case.

Whether by "as enforced" or truly "bifurcated" flow control ordinances that prohibit the delivery of waste to alternative in-state facilities, de facto flow control schemes such as so-called "market participant" franchise requirements that are essentially regulatory licensing programs, or "economic flow control" programs that create no "legal" obligation to use a preferred facility yet impose an economic

disincentive to go elsewhere, a number of local governments have sought to undermine the *Carbone* holding through new or modified flow control requirements. John H. Turner, *The Flow Control of Solid Waste and the Commerce Clause: Carbone And Its Progeny*, 7 Vill. Envt. L.J. 203 (1996).

The decision below--particularly by ignoring the obvious protectionist purpose of the regulatory scheme and the implications of the Petitioner's Contract Clause claim--will likely encourage the implementation of similar programs in other jurisdictions.[2] As this Court is well aware, flow control measures, whether directly imposed as in *Carbone* or as implemented "through the back door", have serious, adverse consequences.

The proliferation of flow control requirements has lead to an increased number of inefficient and non-cost-effective facilities. Regional intergovernmental cooperation and the development of truly regional landfills have, for the most part, not occurred. If every municipality or county decided to site its

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[2] Several jurisdictions outside the Second Circuit have contended that this Court's denials of certiorari in *SSC Corp. v. Town of Smithtown*, 66 F.3d 502 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 911 (1996) and in *USA Recycling, Inc. v. Town of Babylon, New York*, 66 F.3d 1272 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1419 (1996), immunize from Commerce Clause scrutiny franchise ordinances whose waste delivery provisions are essentially nonnegotiable, even though the resulting process is virtually identical to flow control mandates created by the type of ordinance invalidated in *Carbone*. Unlike some franchise arrangements, in which the award is either for collection only and the hauler may choose the collection site, or combined collection/disposal franchises in which the hauler and community may negotiate which disposal site(s) is utilized, in these programs the franchisee has "no choice", and must indeed utilize a particular facility as a condition of the franchise. Likewise, some local governments have sought to condition the franchise program by requiring that a waste hauler indicate in the franchise application its "plan for disposal" or otherwise state that it will utilize a preferred disposal facility. In such cases, the Commerce Clause has been violated.

own landfill, recyclery, and composting facility and instituted flow control measures, there would be a great misallocation of resources and an undesirable environmental outcome. In addition, flow control measures often result in a significant "takings" issue, both in the constitutional sense and from the standpoint of fairness. This issue can arise in the context of and affect both public and private facilities that are already in existence. When one jurisdiction establishes flow control, other facilities immediately have current and potential customer assets pulled away that might be critical to the economic viability of the operation.

Flow control requirements add "approximately $10 per ton or 33 percent to the average landfill disposal charge (tip fee) nationwide", "$11.50 per ton or 23 percent to the average incinerator disposal charge (tip fee) nationwide", and "approximately $14 per ton or 33 percent to the average transfer station disposal charge (tip fee) nationwide."[3]

Moreover, there is no demonstrated correlation between flow control and environmentally protective waste disposal, recycling, or processing. To the contrary,

> . . . by mandating that local waste haulers use particular management facilities, the haulers are prevented from using more environmentally

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[3] National Economic Research Associates, *The Cost of Flow Control*, May 3, 1995, at 1-2. In addition, several of the pre- and post-*Carbone* decisions have noted the significant and artificial economic dislocations created by flow control mandates. *See, e.g., Waste Systems Corp. v. County of Martin, Minn.*, 985 F.2d 1381, 1387 (8th Cir. 1993) ($72 per ton disposal fee at designated facility; $30 at nearby facility); *J. Filiberto Sanitation, Inc. v. New Jersey Dept. of Environmental Protection*, 857 F.2d 913, 916 (3d Cir. 1988) (flow control resulted in $100 per ton disposal charge, as opposed to rates "approximately half" at accessible facilities); *Container Corp. of Carolina v. Mecklenburg County*, No. 3:92 cv-154-MU, 1995 WL 360185 (W.D.N.C. June 22, 1992) ($37.50 per ton/$29.50 per ton).

> sound alternatives that may exist elsewhere. The Sierra Club and other environmental groups have rightly pointed out that such regulations often inhibit the development of alternative waste management options and, in some cases, disrupt preexisting waste recovery and recycling efforts. Flow control laws unnecessarily inhibit the ability of recyclers and other ecological entrepreneurs to compete in the marketplace and provide more economical waste management options. For that reason, and because flow control has frequently been used to finance costly and inefficient incinerators, flow control is opposed by the New York Public Interest Research Group, the National Resources Defense Council, the National Wildlife Federation, Clean Water Action, and Greenpeace, among others. Those groups maintain that in practice it is likely that the environmental costs of flow control outweigh its benefits.[4]

These significant economic and environmental arguments against flow control measures are clearly applicable to most flow control programs--regardless of the method by which they were created. By selecting as the designated site a facility that may not, and all-too-often does not, satisfy best available technology standards, local governments clearly have not sought to promote environmental protection through their flow control mandates. Flow control requirements are typically imposed for economic, not environmental, reasons. And, as the National Solid Wastes Management Association ("NSWMA") demonstrated in a report on flow control programs in Ohio, the requirements adopted by the state's political subdivisions have increased costs to

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[4] Jonathan H. Adler, *The Failure of Flow Control*, 18 Regulation, 1995, No. 2, at 11, 13

generators and transporters of waste without providing any environmental benefit. National Solid Wastes Management Association, *The Effects of Designation and District Fees on Solid Waste Management in Ohio* (1993) at 4, 5. The NSWMA report noted that the selection of certain landfills as "designated" flow controlled facilities means that many tons of wastes are disposed of at less than state-of-the-art facilities. Moreover, the creation of county/district flow control programs in Ohio has significantly reduced inter-county and inter-district waste movements, resulting in a balkanization of the marketplace. *Id.* at 4.

Flow control requirements are illegal, wasteful, and counterproductive. Yet they continue despite this Court's unambiguous ruling in *Carbone*. The Stonington scheme is far from isolated--it is typical of post-*Carbone* efforts to restrict the movement of waste. Such programs and actions balkanize waste movements. They preclude the development of regional disposal solutions, in spite of the U.S. Environmental Protection Agency's view that multi-governmental regional sites are cost-effective and more likely to be managed in an environmentally protective manner. *See* 56 Fed. Reg. 50,978, 50,989 (1991).[5] The decision below threatens the national marketplace in solid waste management by endorsing balkanizations that cannot be squared with the goals of a national economic unit, and with the particular need for the efficient, environmentally protective disposal of solid waste. The petition provides an opportunity for this

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[5] In issuing the Resource Conservation and Recovery Act ("RCRA") "Subtitle D" regulations applicable to municipal solid waste landfills, 40 C.F.R. Part 258, the Agency emphasized that "small landfills tend to be poorly located and designed, and operate at the high end of the cost per ton scale. As a result, small communities have a number of strong incentives to regionalize and, in fact, many of them have moved or are currently moving to regional facilities.")

Court to declare that it meant what it said in *Carbone*--flow control measures violate the Commerce Clause.

II. THE DECISION BELOW IS A CLEAR DEPARTURE FROM THIS COURT'S RULING IN *CARBONE*.

Stonington, by invoking the so-called "market participant" exception to the dormant Commerce Clause,[6] seeks to rely upon the Second Circuit's decisions in *SSC Corp. v. Town of Smithtown*, 66 F.3d 502 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 911 (1996) and *USA Recycling, Inc. v. Town of Babylon, New York*, 66 F.3d 1272 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1419 (1996). In both cases, the towns actually operated as market regulators, rather than mere participants. Smithtown, for example, implemented its program through a permit process--private waste haulers could not operate within the City in the absence of a permit--the creation of solid waste collection districts and the award of exclusive collection rights within those districts, the imposition of civil and criminal penalties for noncompliance, and a refusal to accept municipal bids from any party that refused to agree to abide by the City's requirements.

Likewise, no private party could have engaged in the anti-competitive behavior exhibited by Stonington without the substantial risk of legal liability. Private parties cannot enact laws and promulgate regulations. They cannot prohibit competitors from operating within particular marketplaces. They cannot create their own enforcement mechanisms to subject competitors to criminal and civil fines. They act for commercial reasons, not public policy ones. The Second

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[6] *See generally* Bruce H. Aber, Note, *State Regulation of Out-of-State Garbage Subject to Dormant Commerce Clause Review and the Market Participant Exception*, 1 Fordham Envtl. L. Rep. 99, 105-08 (1989).

Circuit's approach renders the market participant/regulator distinction unworkable.[7]

There are numerous other deficiencies in the reasoning of the Circuit court in this case. The market participant doctrine is properly limited to instances in which a state participates in a marketplace (without seeking to control it) as a buyer and seller of goods or as a direct employer, not simply as a beneficiary of services that are performed by independent parties (here, waste haulers).[8] The activities of Stonington have an obvious impact on "down-stream" markets, in contravention of this Court's ruling in *South-Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984).[9] The clear "fiction" created by

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[7] *See, e.g., Camps/Newfound/Owatonna, Inc. v. Town of Harrison*, 117 S. Ct. 1590, 1606-07 (1997); *New Energy Co. v. Limbach*, 486 U.S. 269, 277 (1988).

[8] *See Hughes v. Alexander Scrap*, 426 U.S. 794 (1976); *Reeves v. Stake*, 447 U.S. 429 (1980); *White v. Mass. Council of Constr. Employers, Inc.*, 460 U.S. 204 (1984).

[9] *See* Randall S. Abate & Mark E. Bennett, *Constitutional Limitations on Anticompetitive State and Local Solid Waste Management Schemes: A New Frontier in Environmental Regulation*, 14 Yale J. Reg. 165, 191-92 (1997) (The *Smithtown* "court's conclusion that the town acted as market participant (whose actions are not subject to the Commerce Clause limitations) in contracting for waste disposal services in fulfillment of the objectives of the flow control ordinance is inconsistent with its ruling on the flow control ordinance and sets a bad precedent. The court's holding regarding the waste hauling contracts at issue in [*Smithtown]* allows the town to 'have it both ways' by simultaneously escaping *Carbone* Commerce Clause scrutiny and enjoying antitrust immunity. In essence, what the court precluded the town from pursuing on a broad scale in the form of the flow control ordinance, it enabled the town to undertake on a cumulative, piecemeal basis in the form of the waste hauling contracts. The *[Smithtown]* decision could send a dangerous message to municipalities in the solid waste management field by encouraging them to enter into waste hauling contracts with private contractors as market participants to achieve anticompetitive results. This would allow them to make an 'end run' around what they otherwise would be prohibited from achieving as

application of the market participant doctrine concerns, in part, the fact that local governments that invoke it to defend flow control mandates are, ironically, at the same time asserting that solid waste collection is a traditional governmental function that implicates police power concerns--an inherently regulatory activity. More pragmatically, the type of sweeping reorganization of solid waste collection engaged in by Smithtown, Babylon and Stonington presents a variety of state law,[10] political[11], and economic[12] consequences. Moreover, at least in Smithtown's case, the desired return of waste flows to the chosen facility did not occur.[13]

The Third Circuit Court of Appeals, rejecting application of the market participant doctrine, held in *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788 (3d Cir. 1995), cert. denied, 116 S. Ct. 1265 (1996), that the Commerce Clause is applicable

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market regulators."); Note, *SSC Corp. v. Town of Smithtown and USA Recycling, Inc. v. Town of Babylon: Reinvigoration of the Market Participant Exception in the Arena of Municipal Solid Waste Management*, 49 Vand. L. Rev. 753, 782-83 (1996) (casting doubt on the wisdom of the *Smithtown* and *Babylon* decisions in light of antitrust immunity).

[10] *See, e.g., Eads St. Corp. v. Town of Babylon*, 631 N.Y.S.2d 878 (N.Y. App. Div. 1995).

[11] *See* Steve Daniels, *Haulers Sue N.Y. Town*, Waste News, Sept. 1, 1997, at 3 ("Officials in the Long Island, N.Y. town of Babylon allegedly conspired to hand a politically connected group of haulers a lucrative commercial carting contract and then illegally sweetened the deal just before it took effect, two carting companies and three commercial generators charged in a lawsuit. . . . (T)he U.S. Attorney for the Eastern District of New York state, as well as the Suffolk County, N.Y. district attorney's office reportedly are investigating at least some of the allegations"); Bob Brown, *N.J. Haulers Sue Official*, Waste News, Sept. 29, 1997, at 2.

[12] For example, a movement to an exclusive franchise system from "open subscription" means fewer choices for generators and can have the effect of putting smaller waste haulers out of business.

[13] *See* Mary Greczyn, *N.Y. Town Fixes Its Flow*, Waste News, Nov. 3, 1997, at 3.

and that a different standard--an elaborate examination of the totality of the evidence, including evidence of protectionist intent or motivation--applies when the flow control mandate or program results from franchising or competitive contracting for the disposal (rather than the collection, or the collection and disposal) of solid waste.[14] The Third Circuit's insistence upon a searching review of the motivations of the public entity and the components of the bidding and award processes is a significant departure from the type of axiomatic Commerce Clause immunity granted by the Second Circuit. *See also Waste Recycling, Inc. v. Southeast Alabama Solid Waste Disposal Authority*, 814 F. Supp. 1566 (M.D. Ala. 1993), *aff'd without opinion*, 29 F.3d 641 (11th Cir. 1994).

A good example of the proper reach of the Commerce Clause in these cases is found in *Tracy v. Hebron*, No. 4:CV95-3218, slip op. (D. Neb. May 2, 1996). There, the defendant entered into a contract with a landfill that obligated the City to deliver regulated wastes to the facility. The plaintiff, a waste hauler, had a contract with a competing landfill and refused to comply with the terms of the City's contract. In retaliation, the City stated that it would renew the hauler's waste collection license (a mandatory requirement for collection of waste within the City), only on the condition that the hauler deliver waste to the designated facility. When the City ascertained that the hauler was continuing to use the other landfill, it passed a resolution revoking his license. Eventually, the City selected another company as the exclusive franchisee. The court found that the Commerce Clause had been violated.[15]

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[14] The *Harvey & Harvey* test was followed in *Barker Bros. Waste, Inc. v. Dyer County Legislative Body*, 923 F. Supp. 1042 (W.D. Tenn. 1996).

[15] The appropriately narrow reach of the "market participant" exception was noted in *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders* (Atlantic Coast I), 45 F.3d 701 (3d Cir. 1995), in which the court emphasized that "(w)hen a public entity

In similar cases, other courts have refused to follow the market participant doctrine. In *Condon v. Andino, Inc.*, 961 F. Supp. 323 (D. Me. 1997), a federal district court invalidated a franchise ordinance that required that waste haulers deliver materials to a particular facility as a condition of the franchise. The court reasoned that the market participant doctrine did not save the ordinance from the Commerce Clause and invalidation because a private party could not legally prevent competitors with whom it did not enter into contractual arrangements from operating within a particular area. Likewise, in *Heir's Trucking, Inc. v. Waupaca County*, 569 N.W.2d 353 (Wis. Ct. App. 1997), the Wisconsin Court of Appeals struck down a flow control requirement, rejecting the market participant defense on the ground that "(t)his is not a power that a private party selling processing services could use to require persons to do business with it."

In addition, the Stonington scheme was infected with protectionist motivation. A state or local measure that discriminates against commerce, either on its face or in practical effect, is subject to a strict standard--the discriminatory measure can survive only if it serves a legitimate local purpose and is the least discriminatory alternative to achieve local goals. *Hughes v. Oklahoma*, 441 U.S. 332 (1979); *Brown-Forman Distillers v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986), ("When a state statute. . .discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck

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participates in a market, it may sell and buy what it chooses, to or from whom it chooses, on terms of its choice; its market participation does not, however, confer upon it the right to use its regulatory power to control the actions of others in that market." *See also Container Corp. of Carolina v. Mecklenburg Co.*, 1995 WL 360185 (W.D.N.C. June 22, 1995); *Southcentral Pa. Waste Haulers Ass'n v. Bedford-Fulton-Huntingdon Solid Waste Authority*, No. 1:CV-93-1318, slip op. (M.D. Pa. Mar. 23, 1995).

down the statute without further inquiry"). Moreover, this Court has also determined that a state or local measure that demonstrates "simple economic protectionism" (*i.e.*, protectionist intent) is also subject to a "virtually per se rule of invalidity." *Philadelphia v. New Jersey*, 437 U.S. 617 (1978) at 623-24. If discriminatory intent is shown, a litigant may argue that per se scrutiny, and not *Pike* balancing, is applicable--even if the measure is worded in an "even-handed" fashion.[16] *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333 (1977).

Even seemingly nondiscriminatory measures have been invalidated pursuant to the more rigorous "virtually per se" test enunciated in *Philadelphia v. New Jersey* and a host of other decisions. Protectionist intent or motivation is, itself, "economic protectionism" and grounds for invalidation of a measure, even if the governmental act is not facially discriminatory. Indeed, a finding of protectionist purpose, motivation, or effect is fatal. *See, e.g., Healy v. The Beer Institute, Inc.*, 109 S. Ct. 2491 (1989) (invalidating a Connecticut beer pricing affirmation statute as "just the kind of competing and interlocking local economic regulation that the Commerce Clause was meant to preclude.") Statutes that evidence protectionism are invalid, even if they neither facially discriminate nor impose, in fact, a disproportionate burden on interstate commerce. *See also Bradley v. Public Utilities Commission*, 289 U.S. 92, 95 (1933); *Buck v. Kuykendall*, 267 U.S. 307, 315 (1927). *Carbone* and its progeny are likewise consistent with the long-held maxim that isolationist or protectionist measures are "*impermissible* under the Commerce Clause." *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 685 (1981) (Brennan, J., concurring) (emphasis included).

The overall purpose of the Commerce Clause is, of course, to preclude economic isolation and balkanization. *See*,

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[16] *Pike v. Bruce Church, Inc.*, 397 U.S. 617 (1970).

e.g., *Hughes v. Oklahoma*, supra, 441 U.S. at 325-26 (1979) (the avoidance of "economic Balkanization" was the "central concern" of the framers.); Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1110-15 (1986); Schrock & Welsh, *Reconsidering the Constitutional Common Law*, 91 Harv. L. Rev. 1117, 1140 (1978). In implementing its system, Stonington expressly desired and anticipated that collected waste volumes would remain subject to the flow control system. By ignoring that evidence, the Second Circuit also ignored this Court's precedents.

III. THIS CASE PRESENTS AN ISSUE OF CONSIDERABLE IMPORTANCE GIVEN THE THREAT TO THE NATIONAL ECONOMY PRESENTED BY LOCAL FLOW CONTROL MEASURES.

All political subdivisions of all of the states of our Union depend upon open borders and a national economy that imposes both benefits and burdens. The Commerce Clause serves to ensure that those borders remain open, and that they not be closed as to some commodities, while open for others. Stonington has made no effort to preclude the importation of seemingly desirable foodstuffs, manufactured goods, service equipment, etc., or the export of other locally-produced goods for sale elsewhere, but for purely economic reasons seeks to prohibit the export of a single commodity--waste.

The post-*Carbone* efforts of local governments to retain existing and impose new flow control mandates and programs despite this Court's ruling are reminiscent of other regrettable episodes in our Nation's history. The authority and duty of this Court to intervene are clear. In the absence of the Court's intercession, political subdivisions and waste management authorities will engage in an unnecessary and counterproductive

war of retaliation--as jurisdictions whose economies are disadvantaged, due to the loss of imported waste volumes, act in kind by precluding the export of their wastes. Very real safety and health threats will result from continued reliance upon older, often substandard disposal sites. The goals of the Congress in enacting RCRA and of the EPA in promulgating the Subtitle D rules will be ill served.

Restrictions on the movement of waste--whether imposed directly or, as here, through the "back door"--affect, indeed, substantially so, the national marketplace by artificially distinguishing between "waste" materials and the open borders that facilitated the transportation, importation, purchase, and consumption of the "original" materials. They deprive companies such as BFI, as well as governments who construct or expand state-of-the-art facilities, the ability to make meaningful long-term investments in disposal capacity and transportation vehicles. They disrupt regional intergovernmental efforts to improve the efficiency and environmental protectiveness of waste disposal. They artificially and dramatically increase the costs of solid waste management. And, perhaps most importantly, they constitute deliberate efforts to circumvent the goals of the Commerce Clause and this Court's numerous opinions. Review by this Court is necessary to ensure that the Commerce Clause's vital role in protecting a truly national economy is not diminished.

IV. REVIEW IS NECESSARY IN ORDER TO ENSURE THAT THE CONTRACT CLAUSE IS NOT REDUCED TO A CONSTITUTIONAL VESTIGE.

The Second Circuit's cursory rejection of Petitioner's Contract Clause argument also justifies this Court's review.

This Court has long held that a state or local statute, ordinance, or regulation may, pursuant to the Contract Clause found in article I, section 10 of the Constitution, not impair "the obligations of Contracts." *See, e.g., Sturges v. Crowninsheild*, 17 U.S. (4 Wheat.) 122 (1819) (a statute cannot effectively prohibit or impair the implementation of a contract in existence as of the time of passage of the requirement). Although the Court has held that the "prohibition against impairing the obligation of contracts is not to be read literally", *Keystone Bituminious Coal Ass'n v. DeBenedictis*, 107 S. Ct. 1232, 1249 (1987), when a state or local requirement promotes a "substantial impairment of a contractual relationship", *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978), the impairment must be *both* necessary and reasonably designed to promote a valid public purpose. *See also Energy Reserve Group v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983); *United States Trust Co. v. New Jersey*, 431 U.S. 1, 28-32 (1977).

The Stonington scheme seriously impaired the Petitioner's existing contractual obligations--it destroyed the ability of Petitioner to perform the contracts. This Court has never insisted that contract rights be completely destroyed to implicate the Contract Clause--instead, the decisions refer to "substantial impairment". *Allied Structural Steel v. Spannaus*, *supra*, 438 U.S. at 244. Petitioner's contractual agreements were, undoubtedly, substantially impaired Moreover, the Second Circuit ignored this Court's admonition that in order to withstand scrutiny substantial contractual impairment must be *necessary*. The Circuit court's rationale essentially relegates the Contract Clause to a constitutional aberration. Yet this Court has declared that its decisions have hardly "indicated that the Contract Clause was without meaning in modern constitutional jurisprudence, or that its limitation on state power was illusory." *United States Trust Co.*, supra, at 25-26. Indeed, "(i)f the Contract Clause is to retain any meaning at all, . . . it must be understood to impose *some* limits upon the power of a State to

abridge existing contractual arrangements, even in the exercise of its otherwise legitimate police power." *Allied Structural Steel, supra*, 438 U.S. at 242 (emphasis in the original).

The Second Circuit's "complete deference to a legislative assessment of reasonableness and necessity is not appropriate because [Stonington's] self-interest is at stake." *United States Trust Co., supra*, 431 U.S. at 26. If states and their political subdivisions can merely point to a listing of purported goals that are then accepted as long as they are rational, the Contract Clause--which reflects the "high value the Framers placed on the protection of private contracts" and the importance that "(o)nce arranged, those [contractual] rights and obligations are binding under the law, and the parties are entitled to rely upon them", *Allied Structural Steel, supra*, 438 U.S. at 245, would be nullified. Flow control requirements are never necessary; there are a variety of non-discriminatory alternatives, such as competition in the marketplace, rather than destruction of it, that are available. The Second Circuit's reasoning allows purely economic "justifications" to trump both the adverse consequences of flow control programs and the unmistakable methods by which communities such as Stonington can respond to this Court's ruling in *Carbone*.

CONCLUSION

This case presents an extremely important question for the Court's consideration, one which impacts individuals, businesses and governmental bodies throughout the country. Despite this Court's decision in *Carbone*, local governments have continued their efforts to create protectionist schemes that thwart the free flow of commerce. The extent of those ongoing disputes, the significance of the environmental and economic

interests implicated, and the need for clear and unequivocal guidance on these issues from this Court all support the grant of certiorari.

Respectfully submitted,

BFI Waste Systems of
North America, Inc.
Jerry L. Mitchell, Jr.
757 N. Eldridge
Houston, TX 77079
(281) 870-7190

Attorney of Record for
Amicus Curiae
BFI Waste Systems of
North America, Inc.

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In The
Supreme Court Of The United States
October Term, 1997

SAL TINNERELLO & SONS, INC.,
Petitioner

v.

TOWN OF STONINGTON; STONINGTON RESOURCE RECOVERY AUTHORITY; AND DONALD R. MARANELL, FIRST SELECTMAN,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY / SUPPLEMENTAL BRIEF

ELIOT B. GERSTEN
Counsel of Record
GERSTEN & CLIFFORD
214 Main Street
Hartford, CT 06106
(860) 527-7044

STANLEY E. COX
PROFESSOR OF LAW
NEW ENGLAND SCHOOL OF LAW
154 Stuart Street
Boston, MA 02116
(617) 422-7330

Counsel for Petitioner

17pp

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TABLE OF CONTENTS

1) *Trash takeover is not a core governmental function*.....1

2) *The second circuit bifurcates analysis of a unified regulatory scheme*.....3

3) *Circuit differences are real*.....4

4) *Unless this Court reverses, lower courts will attribute improper significance to the second circuit opinions*.....5

5) *The second circuit's contract clause rulings provide additional and independent grounds for certiorari*.....10

TABLE OF AUTHORITIES

Cases:

Allied Structural Steel, Co. v. Spannaus,
438 U.S. 234 (1978).....10

Atlantic Coast Demolition & Recycling,
Inc. v. Board of Chosen Freeholders
(Atlantic Coast I), 48 F.3d 701 (1995)
cert denied 118 S.Ct. 412 (1997)
(Atlantic Coast II).....6,8

Automated Salvage Transp., Inc. v.
Wheelabrator Environmental Systems,
Docket No. 96-9281 (2d Cir. 1998),
1998 U.S. App. LEXIS 22030.....7,9

Bennett Elec. Co. v. Village of Miami,
Case No. 97-0727-Civ-Moreno
(S.D. Fla 1998).....1,3,5

C&A Carbone, Inc. v. Town of Clarkstown
511 U.S. 383 (1994).....2,4,5,6,7,8

California Reduction Co. v. Sanitary
Reduction Works
199 U.S. 306 (1905).....2,3

Chemical Waste Management, Inc. v. Hunt
504 U.S. 334 (1992).....2

City of El Paso v. Simmons, 379
U.S. 497 (1965).....10

Fort Gratiot Sanitary Landfill v. Michigan DNR, 504 U.S. 353 (1992).....2

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985).....2

Gardner v. Michigan 199 U.S. 325 (1905).....2,3

General Motors Corp. v. Tracy, 519 U.S. 278 (1996).....6

GSW, Inc. v. Long County, 999 F.2d 1508 (11th Cir. 1993).....5

Harvey & Harvey, Inc. v. County of Chester, 68 F.3d 788 (3rd Cir. 1995).....4

Home Building & Loan Assn. v. Blaisdell, 290 U.S. 398 (1934).....10

Houlton Citizens' Coalition v. Town of Houlton, Civ No. 97-216-B (D.Me.1997), 1998 U.S. Dist. LEXIS 9704.....1,3,5

Huish Detergents, Inc. v. Warren County, Kentucky, Civil Action No. 1:97-CV-123-M (W.D. Ky. 1998).....1,5

National Solid Waste Management Association v. Williams, 146 F.3d 595, n.5 (8th Cir 1998).....6

Oregon Waste Systems v. Oregon DEQ, 511 U.S. 93 (1994).....2

Philadelphia v. New Jersey, 437 U.S. 617 (1978).....7

SSC Corp. v. Town of Smithtown 66 F.3d 502 (2d Cir. 1995).....8

USA Recycling, Inc. v. Town of Babylon 66 F.3d 1272 (2nd Cir. 1995).....2,8

Waste Mgmt. of Alameda County v. Biagani Waste Reduction Sys., 74 Cal. Rptr. 2d 676 (Cal. App. 1998).....5

Waste Recycling, Inc. v. Southeast Alabama Solid Waste Disposal Authority 814 F.Supp. 1566 (M.D. Ala. 1993) affirmed without opinion, 29 F.3d 641 (11th Cir. 1994).....5

Water Dist. No. 1 of Johnson County v. Mission Hills Country Club, 265 Kan. 355, ____ P.2d ____ (1998).....6

Zenith/Kremer Waste Sys. v. Western Lake Superior Sanitary Dist. 572 N.W.2d 300 (Minn. 1997).....5,8

Statutes

42 U.S.C. Section 6901ff.....2

Miscellaneous:

Dan T. Coenen,
The Impact of the Garcia Decision on the Market Participant Exception to the Dormant Commerce Clause, 1995 Univ. Ill. Law Rev. 727.....2

Pursuant to Supreme Court Rule 15, Tinnerello (Petitioner) submits this Reply Brief/ Supplemental Brief.

1) Trash takeover is not a core governmental function.

Stonington argues that its trash takeover constitutes "core governmental function." See brief at pp. 6 ff. This argument is also being made in other jurisdictions. See, e.g., *Houlton Citizens' Coalition v. Town of Houlton*, Civ. No. 97-216-B, (D. Me. 1998), 1998 U.S. Dist. LEXIS 9704, [Decided June 29, 1998]; *Huish Detergents Inc. v. Warren County, Kentucky*, Civil Action No. 1:97- C V-123-M, (W.D. Ky. 1998) [entered March 31, 1998] (unreported; currently on appeal to 6th Circuit); *Bennett Elec. Co. v. Village of Miami*, Case No. 97-0727-CIV-MORENO, (S.D. Fla 1998), 1998 U.S. Dist. LEXIS 8473 [Decided May 7, 1998]. This Court should grant certiorari to correct erroneous assumptions about government core functions.

Stonington's takeover of the trash market took place after Tinnerello operated for in excess of 25 years. How a power not previously exercised suddenly becomes a core function is a mystery, and should raise flags of concern for this Court. Under these courts' logic, any time any municipality chooses to take over any market, this apparently constitutes exercise of a "core

governmental function." [1]

Stonington's real point about "core governmental function" consists of misplaced reliance upon the *California Reduction* and *Gardner* cases. See brief at p. 7. Through grant of certiorari, this should to make unambiguously clear what it has already implicitly ruled in *Carbone*: The *California Reduction* and *Gardner* cases are irrelevant to modern dormant commerce clause inquiries.

Nevertheless, several courts act as if this Court in 1905 explicitly endorsed government trash, and immunized such takeovers from dormant commerce clause attack. See *USA Recycling, Inc. vs. Town of Babylon*, 66 F.3d 1272 (2nd Cir. 1995);

1/ Tinnerello expresses no opinion on what, if any, "core governmental functions" might be so tied to the state's ability to operate as a state that federal interference would destroy state sovereignty. Cf. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985); *see also* Dan T. Coenen, *The Impact of the Garcia Decision on the Market-Participant Exception to the Dormant Commerce Clause*, 1995 Univ. Ill. L. Rev. 727. If there are core governmental functions that cannot be interfered, trash collection is not one of them. The federal government already extensively regulates municipal solid waste. See 42 U.S.C. Section 6901ff. This Court several times this decade has prevented state or local government from doing with trash what the local government thought was best. See *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994); *Oregon Waste Systems v. Oregon DEQ*, 511 U.S. 93 (1994); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan DNR*, 504 U.S. 353 (1992); *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334 (1992).

Houlton, supra; *Bennett*, supra. Even if *California Reduction* and *Gardner* had anything to say about commerce clause challenges to a municipality's trash regulation, this Court should re-emphasize how the commerce clause landscape has changed since 1905. At the turn of the century there may have been doubt about federal ability to regulate local trash activities. In 1998 there is no doubt about Congress's commerce clause power to regulate local trash activities. Accordingly, dormant commerce clause scrutiny also is appropriate.

2) The second circuit bifurcates analysis of a unified regulatory scheme.

The second circuit's flawed market participation arguments also demonstrate why certiorari would be appropriate in this case. Under the second circuit's approach, government "takeover" of the trash market is artificially bifurcated from the contracts which the government makes as a result of the takeover. The local government's decision to take over the trash market is examined as an abstract proposition, even though designed to accomplish a specific flow control which could not have been enacted absent the takeover. Market participant arguments are then applied to contracts (contracting for disposal of *all* waste generated within the town) which could never have been made by a private entity. The result is market participation subterfuge. Although the government has expended no resources in market

participation, but has merely *decreed* that the market is now taken over, supposedly whatever it now additionally orders (via government contract) is immune from commerce clause attack. Surely the principles of *Carbone* cannot be so easily subverted.

3) Circuit differences are real.

Stonington erroneously claims that all lower courts are approaching waste monopoly situations in the same fashion. This is not so.

Stonington argues that the Third Circuit's focus upon the unified act of flow control designation is irrelevant to the second circuit's bifurcated evaluation of "takeover." It is, however, exactly this *difference* in approach which Tinnerello is drawing to this Court's attention. The *Harvey & Harvey* court analyzed the monopoly flow control issues before it as public utility actions. (68 F.3d 788, 800-03). There is no constitutional distinction between issues of public utility designation (third circuit) and government takeover (second circuit). National waste companies, such as amicus BFI, must operate under *different* rules to become exclusive service providers in the second circuit compared to the third circuit. The difference between the two circuits' approaches is real.

Differences also exist between the second and the eleventh circuits regarding the amount of

government investment required before government can claim market participant exemption. Stonington completely ignores Tinnerello's citation of the *GSW v. Long County* case and misreads the eleventh circuit's *Waste Recycling* decision. The eleventh circuit thus leaves open only the situation where a municipality completely invests in collection and disposal instead of bidding these out. Tinnerello's point is that the second circuit can *not* endorse market participant exemption for situations where the municipality has *not* invested its own resources in collecting and disposing of trash.

4) *Unless this Court reverses, lower courts will attribute improper significance to the second circuit opinions.*

An increasing number of lower courts are relying upon the second circuit's opinions to approve government-decreed waste monopolies which clearly violate *Carbone*. The second circuit's position is extremely sweeping. Under the decision for which review is here sought, any government-decreed waste monopoly is per se constitutional. This logic (?) unfortunately has been endorsed by lower courts in several jurisdictions, and is being considered in others. See *Houlton*, supra; *Huish Detergents*, supra; *Bennett Electric*, supra; *Waste Mgmt. of Alameda County v. Biagini Waste Reduction Sys.*, 74 Cal. Rptr. 2d 676 (Cal. App. 1998); *Zenith/Kremer Waste Sys. v. Western Lake Superior Sanitary Dist.*, 572 N.W.2d 300

(Minn.1997); cf. *National Solid Waste Management Association v. Williams*, 146 F.3d 595, 600 n.5 (8th Cir 1998) (indicating possibility that local government would adopt second circuit position after/if case became final). Thus *Carbone*'s prohibition on shut-off of waste competition is currently being elided by many courts which recently have looked at these issues.

Nor is the second circuit's reversal of *Carbone*'s presumptions likely to be confined to the waste context. The Kansas Supreme Court recently relied heavily upon the second circuit's waste opinions for its commerce clause ruling that a municipality which takes over commercial water distribution, leaving no room for private competition, *necessarily* cannot thereby violate the dormant commerce clause. *Water Dist. No. 1 of Johnson County v. Mission Hills Country Club*, 265 Kan. 355, 365- 71, __ P.2d __ (1998). [2]

2/ Tinnerello expresses no opinion about the correctness of this decision and notes that there may be significant differences between a water utility, which can only be administered out of fixed pipes, and waste collection and processing, which can be engaged in by any private company with proper trucks and access to landfills. Cf. *General Motors Corp. v. Tracy*; 519 U.S. 278 (1996); *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders* (*Atlantic Coast I*), 48 F.3d 701, 714-15 (1995). The second circuit decision is precisely dangerous however, because it requires no meaningful justification for a monopoly beyond the municipality's declaration that it desires to take over a market for reasons *the municipality* deems important.

Allowing the second circuit's position to remain uncorrected has significant unfortunate consequences. In all jurisdictions where the second circuit's logic has been adopted, government shuts itself off from "the unobstructed flow of interstate commerce" which is presumed best able to solve interstate waste problems. See *Carbone*, 511 U.S. at 393; *Philadelphia v. New Jersey*, 437 U.S. 617, 629 (1978) (disapproving "from efforts by one State to isolate itself in the stream of interstate commerce from a problem shared by all"). One need look no further than the very recent decision in *Automated Salvage Transp Inc. v. Wheelabrator Environmental Systems*, Docket No. 96-9281, (2d Cir. 1998), 1998 U.S. App. LEXIS 22030, [decided August 20, 1998] to see this happening at a state-wide level.

In *Wheelabrator* the second circuit ruled that it violates neither the Sherman Act nor the dormant commerce clause for a state organization to contract with potential competitors to prevent waste going to the competitors from generators in municipalities which have entered into exclusive contracts with the state organization. It is a condition necessarily precedent to the validity of these secondary agreements that the state organization's flow control contracts *with the municipalities* are themselves valid. The *Wheelabrator* court relied specifically upon the logic being challenged in the *instant* petition as background condition to the situation it addressed.

> The long-term waste disposal contracts that CRRA has negotiated with Connecticut municipalities as a vendor of waste disposal services are clearly market participation. See [*USA Recycling*; *SSC Corp.*]. The CRRA-Wheelabrator agreement to protect these contracts from interference by plaintiffs similarly involves the conduct of market participants, rather than the kind of regulatory power exercised by the State as a sovereign. [LEXIS *62]

The result is that Connecticut has effectively shut itself off from all interstate waste competition in order to prop up uncompetitive state created facilities. Other states might be expected to follow Connecticut's lead wherever the second circuit's logic finds favor.

It is unfortunately likely that this Court's continued silence has emboldened lower courts to twist *Carbone*'s commands. As Stonington notes at p. 12 of its brief, "*Significantly*, this Court had denied certiorari in *Atlantic Coast*, *Smithtown* and *Babylon*." (emphasis added). Although it is standard hornbook law that denial of certiorari signifies nothing about the correctness of decisions let stand, Stonington is not alone in attributing to this Court's silence about the 1995 second circuit waste decisions more significance than should be given. This Court's recent denial of certiorari in *Zenith/Kremer Waste Sys.*, 118 S. Ct. 1857 (1998) coupled with earlier denial of certiorari in *Atlantic Coast II*, 118 S. Ct. 412 (1997)

emboldens an increasing number of lower courts to believe that the second circuit's position is the de facto *approved* law of the land.

With the notable exception of BFI, amicus in this case, many larger waste companies may also have calculated that they stand as much to gain as lose by local government monopolies. In the instant case, it is in fact the subsidiary of a larger waste company, U.S.A. Waste, which has received Stonington's exclusive franchise. With the bigger waste companies receiving enough profit via exclusive contracts in some jurisdictions so that they may not wish to challenge such contracts in other jurisdictions, it is often the smaller waste players, who have far more limited resources, who must fight the appellate battles, if anyone does. The instant case is brought by a family business which seeks competition in a single regional waste market, and cannot balance unconstitutional restrictions in Connecticut against free markets in Nebraska .

The current petition for certiorari provides this Court an excellent opportunity to correct lower court misconceptions which seem to be gaining ground. This case does not involve side contracts negotiated between waste competitors. Cf. *Wheelabrator*, supra. The issue raised here is a more basic building block for commerce clause disputes. Because this case raises fundamental questions about government power to abolish interstate competitive markets, which questions

many lower courts are answering incorrectly, this Court should grant certiorari in the instant case.

5) The second circuit's contract clause rulings provide additional and independent grounds for certiorari.

Fuller development of Tinnerello's contract arguments can await the brief on the merits. It is worth noting at this point, however, that Stonington's Brief repeats one of the very second circuit Contract Clause errors which Tinnerello has drawn to this Court's attention in its Petition. This Court did *not,* either in *City of El Paso v. Simmons*, 379 U.S. 497 (1965) nor in *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398 (1934) endorse the notion that any and all economic motivations justify government abrogation of private contracts. In situations where the government acts *to its direct economic benefit*, rather than to alleviate general social economic distress, Tinnerello respectfully submits that the hurdle for government action is much higher than the second circuit has placed it. Because the second circuit's approach under the Contract Clause is inconsistent with this Court's pronouncements, cf. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978), certiorari should be granted in this case.

PETITIONER, SAL TINNERELLO & SONS, INC.

Eliot B. Gersten
Counsel of Record
Gersten & Clifford
214 Main Street
Hartford, CT 06106
(860) 527-7044

Stanley E. Cox
Professor of Law
New England School of Law
154 Stuart Street
Boston, MA 02116
(617) 422-7330
Counsel for Petitioner